Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN ENDRES,
Petitioner,

v.

INDIANA STATE POLICE,
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Benjamin Endres, an officer with the Respondent Indiana State Police was assigned to a full time position as a Gaming Commission Agent at a private casino, performing specialized gambling-related duties that contravened his religious beliefs. Endres requested an accommodation, volunteering to take any other assignment that did not require him to perform acts that violated his religious beliefs, while still affirming that he would enforce general vice laws at casinos. Rather than attempting to accommodate Endres, however, Respondent terminated his employment. Accordingly, Endres presents the following question:

I. Are there any circumstances under which Title VII of the Civil Rights Act may require a law enforcement agency or other "paramilitary" employer to reasonably accommodate an employee's task-specific request for religious accommodation?

PARTIES TO THE PROCEEDING

The Petitioner in this matter is Benjamin P. Endres, Jr., an individual.

The Respondent is the Indiana State Police, the chief law enforcement agency of the State of Indiana.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Benjamin P. Endres, Jr. respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Benjamin P. Endres, Jr. and United States of America v. Indiana State Police*, 349 F.3d 922 (7th Cir. 2003).

OPINIONS BELOW

The opinion of the panel of the United States Court of Appeals for the Seventh Circuit is reported at 349 F.3d 922 (7th Cir. 2003), and is set out hereinafter as Appendix ("App.") A. This opinion was issued in response to Endres's motion for rehearing *en banc*. App. A1. The original opinion of the panel of the Court of Appeals, then consolidated with the decision in *Holmes v. Marion County Office of Family & Children*, is reported at 334 F.3d 618 (7th Cir. 2003). That opinion is set out hereinafter as App. B. The memorandum opinion and order of the United States District Court for the Northern District of Indiana is set out hereinafter as App. C.

STATEMENT OF JURISDICTION

The original judgment of the Court of Appeals was entered on June 27, 2003. App. B1. Endres's petition for reconsideration, or in the alternative for rehearing *en banc,* under Fed. R. App. Proc. 35 and 40, was filed on July 11, 2003, and was denied on November 19, 2003. App. A1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case is brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, which states, in pertinent part:

(a) Employer practices. It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion ....

42 U.S.C. § 2000e-2.

For the purposes of this title — ... (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

STATEMENT OF THE CASE

A. Nature Of The Case

Endres brought this action under the religious discrimination provisions of Title VII of the Civil Rights Act of 1964, alleging that his employer, Respondent Indiana State Police, engaged in prohibited religious discrimination by terminating his employment because he declined to accept a full-time assignment as a Gaming Commission Agent on a casino boat, where the performance of such responsibilities would have caused him to violate his sincerely held religious beliefs. App. A3.

B. The Facts

The District Court denied Respondent's motion to dismiss Endres's Title VII claim. App. C6. Thus, the only facts before the Court are those pleaded in Endres's complaint, attached as App. D.

Endres is an Indiana resident, formerly employed by Respondent Indiana State Police, an entity created and operating under the laws of the State of Indiana. App. D1. Respondent was vested by the State with the authority to establish official policy with respect to certain matters concerning job assignments and to make final decisions in regard to the implementation and execution of such policies, including policies involving job assignments. App. D2.

Endres was hired by Respondent and, shortly thereafter, successfully passed the necessary requirements and was certified as an Indiana State Trooper. App. D2. After Endres became an employee of Respondent, the Indiana Gaming Commission and Respondent entered into an agreement whereby Respondent's troopers would be assigned as full-time Gaming Commission Agents for the Commission. App. D2. Gaming Commission Agents are charged with gambling related responsibilities, including certifying gambling revenue, investigating complaints from the public about the gaming system, and conducting licensing investigations for the casinos and their employees. App. A3.

Endres is and was a member in good standing of the Community Baptist Church in South Bend, Indiana, a bona fide religious organization that holds as a tenet of its faith the position that gambling is a vice which is contrary to the principles of the Bible and that its members should not, in any way, participate in or

facilitate gambling. App. D2.

In March 2000, Endres was notified by Respondent of his full-time reassignment as a Gaming Commission Agent to the Blue Chip Casino, in Michigan City, Indiana. App. D3. Endres, both before and after receiving the official reassignment, informed Respondent that his religious convictions and beliefs would prevent him from accepting the reassignment as a Gaming Commission Agent. App. D3. Accordingly, Petitioner requested an alternative assignment, other than as a Gaming Commission Agent. App. D3.

Endres alleges that Respondent failed or refused to attempt to make any reasonable accommodation for his sincerely held religious beliefs. App. D3. Endres declined to report for his assigned position as a Gaming Commission Agent. App. D3. Thereafter, Endres was charged by Respondent with refusal to comply with a written order and insubordination, and subsequently terminated from his employment. App. D3.

C. The District Court's Judgment

On July 17, 2001, Endres filed a complaint against Respondent, invoking federal question jurisdiction under 28 U.S.C. § 1331. App. D1. In the complaint, Endres alleged that, by its failure to attempt to make any reasonable accommodation for his sincerely held religious beliefs and termination of his employment, Respondent engaged in unlawful employment discrimination against him on the basis of his religion in violation of 42 U.S.C. § 2000e. App. D3. Endres also brought claims under 42 U.S.C. § 1983 and claims for religious discrimination and breach of contract under Indiana law. App. D4.

Respondent moved to dismiss Endres's complaint for lack of

subject matter jurisdiction, arguing that his Title VII and state law claims were barred by Indiana's sovereign immunity. App. C2. The United States intervened to defend the constitutionality of the prohibition on discrimination on the basis of religion under Title VII. App. C2. The United States argued that in prohibiting state employers from discriminating against employees on the basis of religion, Congress had validly abrogated sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.

On December 28, 2001, in an unpublished memorandum opinion and order, the District Court denied Respondent's motion to dismiss Endres's Title VII claim on the basis of sovereign immunity, but granted Respondent's motion to dismiss Endres's other claims. App. C8.

D. The Seventh Circuit's Original Opinion

Respondent took an interlocutory appeal from the District Court's denial of its motion to dismiss to the Court of Appeals for the Seventh Circuit. App. B2. The Seventh Circuit consolidated the *Endres* appeal with the appeal in *Holmes v. Marion County Office of Family & Children*, which involved another Title VII claim for religious accommodation against a state employer. App. B2.

The Seventh Circuit began the *Endres* portion of its opinion by correctly noting that Respondent's motion to dismiss Endres's complaint was based entirely upon its argument that it had sovereign immunity from Endres's Title VII religious discrimination claim in federal court. App. B2; *see also* App. C3. Despite this correct recitation of the Respondent's rationale in its motion to dismiss, the panel focused instead upon an issue not before the trial court and never presented by Respondent in its motion to dismiss. Rather than

addressing whether the trial court properly held that Indiana possessed sovereign immunity from Endres's claim in federal court, the Seventh Circuit panel held that a task-specific request for religious accommodation by an employee of a law enforcement agency or other "paramilitary" employer is *per se* unreasonable. App. B7.

The court began its analysis of the applicability of Title VII to law enforcement personnel like Endres, not by examining the text and history of Title VII, but by mischaracterizing Endres's request. *See* App. A11. Although Endres informed Respondent that he had no religious objection to enforcing general vice laws at casinos, App. A11, the panel asserted: "Endres contends that § 701(j) gives law-enforcement personnel a right to choose which laws they will enforce, and whom they will protect from crime." App. B4. Based on this misconstruction of Endres's request, and without reference to Title VII's provision that employers need not accommodate an employee's religious beliefs where doing so would impose an undue hardship on the employer, the court stated: "If Endres is right, [adherents of the Muslim, Baptist, and Catholic] faiths, and more, must be accommodated by assigning believers to duties compatible with their principles." App. B4. Despite Endres's notice to Respondent that he had no religious objection to enforcing general vice laws at casinos, App. A11, but sought merely to avoid the specialized gambling duties of a Gambling Commission Agent that are aimed directly at facilitating gambling, the court stated then that Endres's position — that Respondent, like all other employers, is bound by the religious accommodation requirements of Title VII — would have "prostitutes ... left exposed to slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith." App. B4.

Its strawman conquered, the court noted that in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), this Court held that Title VII does not require an employer to accommodate an employee's religion if such accommodation would impose more than a minimal hardship on the employer. App. B4. Although Respondent has never argued that it would incur an undue hardship by accommodating Endres, and although the only facts before the Seventh Circuit were those in Endres's complaint, the court speculated that "[j]uggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors." App. B5. The court then concluded that, as a matter of law, "[w]hether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship ... the demand would not be reasonable." App. B5.

To bolster its novel holding that all task-specific requests for religious accommodation by law enforcement officers are unreasonable *per se*, the Seventh Circuit cited two of its previous decisions, each of which differs from this case in the type and degree of accommodation sought. App. B5. Moreover, in both cases, the Seventh Circuit had held that the defendant law enforcement agencies had satisfied their obligations under Title VII to provide a reasonable accommodation for the employee's religion. App. A12. In neither case did the Seventh Circuit suggest, as it concluded in this case, that law enforcement agencies and other "paramilitary" employers are exempt from the religious accommodation provisions of Title VII.

The Seventh Circuit cited nothing in the text or history of Title VII for its conclusion that "paramilitary organizations" were not required, like all other employers, to reasonably accommodate an

employee's religion. App. A13. Nor did the court offer any clear explanation why such organizations, as opposed to other employers, should be exempted from the religious accommodation requirements of Title VII. The court simply asserted that "[l]aw-enforcement agencies need the cooperation of all members," a fact not in the record nor, if true, seemingly unique to "paramilitary" employers. App. B7.

E. The Seventh Circuit's Opinion On Request For Reconsideration

Endres filed a motion for rehearing and rehearing *en banc*. App. A1. The Seventh Circuit declined to rehear the *Endres* appeal, and instead deconsolidated the *Endres* appeal from the *Holmes* appeal, vacated its earlier opinion, issued a new opinion in this case, and granted rehearing in *Holmes*. App. A1. The Seventh Circuit panel's new opinion in *Endres*, virtually identical to the *Endres* portion of the consolidated opinion issued prior to the motion for rehearing, was issued on November 19, 2003. App. A1.

Three Judges, however, dissented from the Seventh Circuit's decision not to rehear the *Endres* appeal. Writing for the dissent, Judge Ripple first criticized the panel's "recharacteriz[ation]" of the accommodation Endres sought, correctly noting that Endres did not object to enforcing general vice laws, even in casinos, but instead "simply asked that he not be assigned on a permanent full-time basis to a gambling establishment." App. A11.

The dissent also took issue with the panel's decision to "blue pencil[] the reasonable accommodation requirement from the statute as it applies to police and fire personnel." App. A12. In addition to finding no support for this decision in the text or history of Title VII, the dissent also found no support in the Seventh Circuit's prior Title

VII case law, noting that, in both of the Court's prior Title VII decisions involving law enforcement officers cited by the panel, the court had determined that the employer had offered a reasonable accommodation, rather than intimating that no such action was required. App. A12. Likewise, in examining the law of other Circuits, the dissent noted that no other Circuit Court of Appeals had crafted such an exemption from Title VII — to the contrary, several sister Circuits had followed the reasonable accommodation analysis in deciding similar cases — and that Congress had given no indication that it intended to do so:

> But Congress simply did not determine that these agencies ought to be given a blanket exemption from the mandate of the statute, and, I respectfully suggest, Congress' ability to determine the wisdom of such an exemption is far superior to ours. On a nationwide scale, public safety organizations come in many shapes and sizes. Some are highly professional; some are not. Some are relatively immune from prejudices, be they racial or religious or otherwise; some are not. Congress apparently saw no reason to exempt categorically such organizations from the plain mandate of the statute and preferred that the boundaries of the reasonable accommodation requirement be established in case-by-case adjudication.

App. A13-14.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review To Address The Seventh Circuit's Unwarranted And Unprecedented Exemption From The Religious Accommodation Requirements Of Title VII For Law Enforcement And Other "Paramilitary Employers.

The Seventh Circuit held that task-specific requests for religious accommodation under Title VII made by law enforcement officers, firefighters, and other employees of "paramilitary" organizations are unreasonable *per se*. App.8-11. Thus, in the Seventh Circuit, such employers are now exempt from the religious accommodation provisions of Title VII, even if an accommodation for the employee's religious beliefs would impose no hardship on the employer. App. A5. This judicially-created exemption from the requirements of Title VII is wholly unsupported by the text or history of Title VII and threatens the religious freedom of public servants in the Seventh Circuit.

A. There Is No Support In The Text Or History Of Title VII For A "Blanket Exemption" For "Paramilitary" Employers From The Statute's Reasonable Accommodation Of Religion Requirements.

The Seventh Circuit held: "Whether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship, ... the demand would not be reasonable — and § 701(j) calls only for reasonable accommodations." App. A5. In the words of Judge Ripple, dissenting from the decision to deny rehearing, the panel "simply blue pencils the reasonable accommodation requirement from the statute as it applies to police and fire personnel." App. A12.

The Seventh Circuit arrived at this novel holding by disregarding the most basic, foundational rules of statutory construction, and by substituting its own judgment for that of Congress. *See Robinson v. Shell Oil, Co.*, 519 U.S. 337, 340 (1997) (regarding the Court's approach to interpreting Title VII: "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning .... [O]ur inquiry must cease if the statutory language is unambiguous and the 'statutory scheme is coherent and consistent.'"). The Seventh Circuit did not cite, nor could it have, any basis in the text or history of Title VII to support its novel holding that law enforcement and other "paramilitary" employers are exempt from the religious accommodation requirements of Title VII. App. A13. Nor did the court cite any decisions of this Court or its sister Circuits for that proposition. Indeed, no other federal or state court has ever held that any class of employers are exempt from the religious accommodation requirements of Title VII.

Congress could have created an exemption from Title VII's religious accommodation provisions for law enforcement and other "paramilitary" employers if it desired to do so. Indeed, Congress has done so where it thought appropriate, specifically exempting religious organizations from the categories of employers subject to the religious accommodation provisions of Title VII. 42 U.S.C. § 2000e-1; *see also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329 (1987).

Congress also has demonstrated that it can and will exempt law enforcement agencies — the same class of employers at issue here — from other accommodation statutes where it deems it appropriate to do so. In 1986 for example, Congress exempted "public safety officers," including law enforcement officers and

firefighters, from certain provisions of the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. § 631(j) (1988). That Congress exempted some employers from Title VII's religious accommodation requirements, but did not exempt law enforcement agencies, or any other "paramilitary" employers — though it clearly has in other situations where it thought it appropriate — indicates that the lack of such an exemption here was no mere oversight.

Furthermore, Congress has made other, arguably more burdensome, federal civil rights statutes applicable to law enforcement agencies, again strongly suggesting that Congress does not share the Seventh Circuit's concerns about the burden on such employers imposed by Title VII's religious accommodation requirements. The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213, *et. seq.*, and the Rehabilitation Act ("RA"), 29 U.S.C. § 701, *et. seq.*, which prohibit employers from discriminating against individuals on the basis of their disabilities, apply without qualification to state and local law enforcement agencies and fire departments.

Like Title VII, both the ADA and the RA impose upon employers "an affirmative obligation to make a reasonable accommodation for a handicapped employee." *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 289 n.19 (1987) (addressing ADA's accommodation requirements); *Buckingham v. United States*, 998 F.2d 735, 739 (9th Cir. 1993) (addressing RA's accommodation requirements). That Congress has seen no need to relieve law enforcement agencies of the more weighty burdens of accommodation imposed by the ADA and the RA again indicates that Congress does not consider the burden to reasonably accommodate an employee's religion to be necessarily more than a law enforcement agency can bear.

B. The Seventh Circuit's Holding That Task-Specific Requests For Religious Accommodation By Law Enforcement Officers And Other "Paramilitary" Employers Are *Per Se* Unreasonable Will Have Dire Consequences For Religious Freedom In The Seventh Circuit.

As a result of the Seventh Circuit's holding that task-specific requests for religious accommodation by employees of law enforcement agencies or other "paramilitary" organizations are *per se* unreasonable, police officers, firefighters, and others in similar professions in the states composing the Seventh Circuit no longer have a right under Title VII to a reasonable accommodation of their religion by their employers. App. A8,11. Even where the accommodation would impose no burden on the employer, such employees in the states composing the Seventh Circuit now have no legal recourse under Title VII. Indeed, because such Title VII claims brought by law enforcement officers and other "paramilitary" employees will no longer survive the employer's motion to dismiss, future plaintiffs will have little chance of compiling a record to challenge the Seventh Circuit's holding that their accommodation claims are *per se* unreasonable.

Should this Court permit the Seventh Circuit's decision to stand, law enforcement officers, firefighters, and other similar public servants in the states composing the Seventh Circuit will be alone in their exclusion from Title VII's religious discrimination protections. App. A13. These public servants will find their religious freedom in greater peril than those they protect.

Still more disturbing is the lack of any discernible limitation on the Seventh Circuit's Title VII exemption to law enforcement and "paramilitary" employers. The panel opinion states: "[L]aw-

enforcement agencies need the cooperation of all members." App. A8. To the extent that this is universally true of law enforcement agencies, although notably not in the record, this fact is no less true of a number of employers, including hospitals, ambulance services, and even many small businesses. But Title VII takes this into account. It does not require employers to accommodate an employee's religion absolutely. Instead, Title VII relieves employers of that burden if the accommodation would result in an "undue hardship." App. A5. As the panel itself noted, in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84 (1977), this Court held that Title VII does not require an employer to suffer more than a "*de minimis* cost" to accommodate the employee's religion. App. A5. Nevertheless, the panel's reasoning that, even in the absence of any such minimal hardship, "paramilitary" employers need not accommodate an employee's religion because of their supposed need for complete cooperation would apply with equal force to many other employers.

The panel opinion also recites "the need to hold police officers to their promise to enforce the law without favoritism ...." App. A8. Ignoring that Endres informed Respondent that he had no religious objection to enforcing general vice laws at the casinos, but asked only to be excused from a full-time assignment performing specialized gambling-related duties as a "Gaming Commission Agent," App. D10, the panel equated Endres's claim with that of a hypothetical Black Muslim policeman who refuses to protect Christians and Jews. App. A8. Setting aside the court's mischaracterization of Endres's request for accommodation, App. A11, the need for an employee to fulfill his or her obligations without favoritism based on his or her religious or political beliefs is not limited to law enforcement officers. Certainly, one would hope that doctors, surgeons, nurses, and other members of the health care professions — similarly bound by oath — would not refuse to

treat a patient because they disagreed with the patient's religious beliefs. Thus, the Seventh Circuit's reasoning leaves open the door to extending its judicially-created Title VII exemption to a host of other employers.

II. The Court Should Grant Review To Resolve The Split Between The Seventh Circuit, On One Hand, And The Fourth, Ninth, Tenth, And Eleventh Circuit Courts Of Appeals On The Other Hand, As To Whether Title VII Requests For Religious Accommodation By Law Enforcement Officers Are Unreasonable *Per Se.*

The Seventh Circuit is alone in holding that task-specific requests for religious accommodation by law enforcement officers and other employees of "paramilitary" organizations are unreasonable *per se*. App. A11. As Judge Ripple acknowledged, the decision "sets [the Seventh Circuit] apart from the other circuits with respect to a fundamental aspect of Title VII law...." App. A9. The Fourth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal have upheld the rights of police officers, firefighters, and other public servants to a reasonable accommodation of their religion under Title VII, holding that whether the accommodation is "reasonable" and whether a hardship on the employer would be "undue" are fact-sensitive determinations. *Balint v. Carson City,* 180 F.3d 1047, 1051 (9th Cir. 1999); *Beadle v. City of Tampa,* 42 F.3d 633, 636 (11th Cir. 1995); *Miller v. Drennon,* No. 91-2166, 1992 WL 137578, at *3 (4th Cir. June 19, 1992); *United States v. City of Albuquerque,* 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977). Petitioner submits that this Court should grant review to resolve this split, albeit unbalanced, among the circuits.

A. The Fourth, Ninth, Tenth, And Eleventh Circuits Have Held That Determining Whether A Request For Religious Accommodation By A Law Enforcement Officer Or Firefighter Is "Reasonable" Requires A Fact-Specific Analysis.

In *Balint v. Carson City,* 180 F.3d 1047 (9th Cir. 1999), the Ninth Circuit Court of Appeals, sitting *en banc*, addressed a Title VII religious accommodation claim brought by a Sabbatarian sheriff's deputy against a city sheriff's department. Balint informed the sheriff's department that she could not work from sundown Friday to sundown Saturday, her Sabbath, and requested that her schedule be adjusted to accommodate her religion. *Id.* at 1049. When the department refused any accommodation, Balint filed a complaint alleging religious discrimination in violation of Title VII. *Id.* at 1050. The District Court granted summary judgment for the sheriff's department, holding that any accommodation would be an undue hardship. *Id.*

The Ninth Circuit reversed. *Id.* at 1056. The court first noted that Balint had established a prima facie case of religious discrimination under Title VII, stating that it was undisputed that Balint was denied employment because of her refusal to work on the Sabbath and that the defendant "conceded that it took no steps to accommodate Balint's request for observance of her Sabbath." *Id.* at 1051. The Ninth Circuit rejected the defendant's argument that its seniority system for shift assignments relieved it of any obligation to reasonably accommodate an employee's religious practices. *Id.* at 1053. The court then reversed summary judgment for the defendant, concluding that there was a genuine issue of material fact as to whether a "split-shift" system would be an undue hardship on the defendant. *Id.* at 1056. The Ninth Circuit reaffirmed that "[w]hat constitutes undue hardship must be determined within

the particular factual context of each case." *Id.* at 1054; *see also American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986) (holding similarly in a Title VII claim involving postal worker).

In *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995), the Eleventh Circuit considered a Title VII religious accommodation claim brought by a Sabbatarian police officer against the Tampa Police Department. Beadle requested an alternative assignment that would permit him not to work on his Sabbath, and the department refused any accommodation. *Id.* at 634. Although the court eventually affirmed judgment for the defendant, the Eleventh Circuit held that "the phrases 'reasonable accommodation' and 'undue hardship' are not defined under the statutes, 'each case necessarily depends upon its own facts and circumstances, and in a sense every case boils down to a determination as to whether the employer has acted reasonably.'" *Id.* at 636 (quoting *United States v. City of Albuquerque,* 545 F.2d 110, 114 (10th Cir. 1976)).

In *City of Albuquerque*, the Tenth Circuit addressed the Title VII religious accommodation claim of a Sabbatarian firefighter. Although the court ultimately affirmed judgment for the defendant, it stated:

> The phrases "reasonably accommodate" and "undue hardship" as used in 42 U.S.C. §2000e(j) are relative terms and cannot be given any hard and fast meaning. Each case necessarily depends upon its own facts and circumstances, and in a sense every case boils down to a determination as to whether the employer has acted reasonably.

City of Albuquerque, 545 F.2d at 114. The Tenth Circuit then reviewed the district court's findings of fact concerning "undue

hardship" and "reasonable accommodation," upholding them as "not clearly erroneous." *Id.* at 115. Finally, the court acknowledged that courts had reached different conclusions as to whether the religious practices of individual Sabbatarians had been reasonably accommodated. *Id.* The court then stated:

> A reading of all these cases leads us to conclude that to a very great degree each case turns on its own particular facts and circumstances. Under the facts and circumstances here present, if we reversed the trial court we would simply be substituting our best judgment of the facts for that of the trial court. This we should not do. Indeed we cannot.

Id.

Finally, in *Miller v. Drennon,* No. 91-2166, 1992 WL 137578 (4th Cir. June 19, 1992), the Fourth Circuit addressed the Title VII religious accommodation claim of a male paramedic whose religious beliefs prevented him from working twenty-four hour shifts in a single bedroom station with a female co-worker. The court held that the accommodations offered by the defendant county's Emergency Medical Services division were reasonable. *Id.* at *3. In reaching this conclusion, the Fourth Circuit held that "[t]he determination of whether an employer has offered a reasonable accommodation depends on the facts of each case ...." *Id.*; *see also* App. A13 (Ripple, J. Dissenting) (citing *Miller*).

B. The Seventh Circuit's Opinion Declares Unreasonable As A Matter Of Law All Requests For Religious Accommodation By Law Enforcement Officers And Other "Paramilitary" Employees.

In stark contrast to the decisions of the Fourth, Ninth, Tenth,

and Eleventh Circuits discussed above, the Seventh Circuit held below that all task-specific requests for religious accommodation by law enforcement officers, firefighters, or other employees of "paramilitary" organizations are unreasonable *per se.* App. A8,11. Notably without citing any of the aforementioned decisions, the Seventh Circuit held: "Whether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship ... the demand would not be reasonable — and § 701(j) calls only for reasonable accommodations." App. A5. The panel held that Endres's requested religious accommodation was "a demand that it would be unreasonable to require any police or fire department to tolerate." App. A8.

The effect of this difference in the approaches to Title VII religious accommodation claims between the Seventh Circuit and the Fourth, Ninth, Tenth, and Eleventh Circuits cannot be overstated. Courts in the Fourth, Ninth, Tenth, and Eleventh Circuits will examine the particular circumstances and facts of a Title VII religious accommodation claim brought by a police officer, firefighter, or other employee of a "paramilitary" organization. *See supra* Sec. IIA. Hence, because a complaint will survive a motion to dismiss so long as any set of facts, consistent with the allegations in the complaint, could be proven that would state a claim, *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514 (2002), it is unlikely that a properly pleaded Title VII religious accommodation claim by a law enforcement officer or firefighter in those circuits would be dismissed for failure to state a claim. This is no longer the case in the Seventh Circuit. As this case illustrates, law enforcement officers, firefighters, and other "paramilitary" employees may no longer even state a valid claim for failure to reasonably accommodate their religious practices under Title VII.

Endres requests no more than that which would be available to

him in any of the other Circuits that have addressed this issue: the opportunity to conduct discovery concerning whether a reasonable accommodation could have been provided to him that would not have imposed an undue hardship on his employer, and to have his Title VII religious accommodation claim evaluated based on its unique facts and circumstances.

III. The Court Should Grant Review To Clarify That Congress Abrogated State Defendants' Eleventh Amendment Sovereign Immunity From Religious Accommodation Claims Under Title VII.

Should review be granted, the Court could limit its review to the issue decided by the Seventh Circuit: whether there are any circumstances under which law enforcement officers and other "paramilitary" employees may state a claim for failure to reasonably accommodate their religious beliefs under Title VII. However, should this Court grant review and decide that question in the affirmative, reversing the Seventh Circuit, the question whether Congress abrogated state sovereign immunity when it enacted the religious accommodation requirements of Title VII would remain. This Court could provide meaningful guidance to the bar and lower federal courts by clarifying that Congress effectively abrogated state sovereign immunity for religious accommodation claims under Title VII.

Respondent moved to dismiss Endres's Title VII claim, arguing that the Eleventh Amendment granted it sovereign immunity from that claim in federal court. App. C4. The district court denied Respondent's motion to dismiss Endres's Title VII claim, holding that Congress had abrogated Respondent's sovereign immunity from Title VII religious discrimination claims. App. C4. The Seventh Circuit declined to address this issue, however, instead deciding that

because Endres was a law enforcement officer, his task-specific request for religious accommodation was unreasonable *per se*. App. A5,11. Nevertheless, in the companion case, *Holmes v. Marion County Office of Family & Children,* originally consolidated with Endres's case on appeal to the Seventh Circuit, the panel held that states retained their sovereign immunity from Title VII religious accommodation claims. App. B17. After the Seventh Circuit granted rehearing *en banc* in *Holmes*, vacating the panel's opinion, the parties settled that case. Thus, whether Congress effectively abrogated sovereign immunity when it enacted the religious accommodation provisions of Title VII will not reach this Court in *Holmes*, and will remain unsettled until clarified by this Court.

Respondent concedes that Congress intended to abrogate sovereign immunity when it enacted Title VII because the statute explicitly provides for a private right of action against state and local governments. App. C4; *see also Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 (1976) (noting that amendments to Title VII "retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf"). Thus, the only question is whether Congress's abrogation of sovereign immunity for Title VII religious discrimination claims was a valid exercise of its authority to enforce the Fourteenth Amendment.

Congress has the authority to abrogate states' sovereign immunity from statutes enacted pursuant to Section 5 of the Fourteenth Amendment. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000). Congress's authority to enforce constitutional rights under Section 5 is broad. *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997). Congress is within its Section 5 authority unless the legislation is "'so out of proportion to a supposed remedial or preventive object that it cannot be

understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel*, 528 U.S. at 82 (quoting *City of Boerne*, 521 U.S. at 532). Although "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern...Congress must have wide latitude in determining where it lies...." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999). Enforcement legislation under Section 5 is appropriate so long as there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520.

Respondent contends that in light of this Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the religious discrimination provisions of Title VII now sweep more broadly than the Free Exercise Clause of the First Amendment. App. A2. Thus, Respondent argues that to the extent that Title VII requires religious accommodation rather than simple neutrality, it is not Section 5 legislation. App. A 2. Respondent argues that therefore the application of Title VII's religious accommodation requirements to state defendants violates the Eleventh Amendment, relying on this Court's holding in *City of Boerne* regarding the Religious Freedom Restoration Act. App. C7.

As illustrated by the Seventh Circuit panel's holding in *Holmes*, this Court's recent decisions in *Smith* and *City of Boerne* have created uncertainty as to the continued vitality of Title VII's religious discrimination protections against state employers in federal courts. App. B16-17. Until squarely addressed by this Court, uncertainty will remain in the lower courts as to whether state employers may be sued in federal court under Title VII for failure to reasonably

accommodate an employee's religion. Should the Court grant review, it could address this issue in this case, illuminating the bar and the lower courts concerning this critically important issue.

CONCLUSION

The Seventh Circuit has held that task-specific requests for religious accommodation by law enforcement officers, firefighters, and other "paramilitary" employees are unreasonable *per se*. This holding represents a dramatic judicial revision of Title VII, is entirely unsupported by the text and history of that statute, and is in direct conflict with the view of at least four other Circuits. Such an unprecedented, illogical, and unnecessary holding should not be permitted to stand in defiance of Congress's intent and in detriment to the religious freedom of our uniformed civil servants.

For these reasons, Endres respectfully requests that this Court grant certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

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BENJAMIN P. ENDRES, JR., Plaintiff-Appellee, and UNITED STATES OF AMERICA, Intervening Plaintiff-Appellee, v. INDIANA STATE POLICE, Defendant-Appellant.

No. 02-1247

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

349 F.3d 922

November 1, 2002, Argued-Decided June 27, 2003

On Petition for Rehearing -Decided November 19, 2003

This appeal originally was consolidated with No. 02-1377, *Holmes v. Marion County Office of Family and Children*, and the two appeals were decided in a single opinion, which is reported at 334 F.3d 618 (7th Cir. 2003). In response to the petition for rehearing and rehearing en banc, the court has decided to de-consolidate the appeals and to issue a separate opinion in each. The panel's opinion resolving this appeal follows.

All members of the panel have voted to deny the petition for rehearing. A judge in active service called for a vote on the petition for rehearing en banc. A majority did not favor rehearing, so the petition is denied. Judges Ripple, Rovner, and Williams voted to grant rehearing en banc. Judge Ripple has written a dissenting opinion (joined by Judges Rovner and Williams) that immediately follows the panel's new opinion.

Before BAUER, POSNER, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge*. Benjamin Endres lost his job with the Indiana State Police after he refused to work at a casino, an enterprise that contravenes his religious beliefs. He sued under Title VII of the Civil Rights Act of 1964, contending that Indiana discriminated against him on account of religion. Endres relies on a definition in § 701(j) of that Act, 42 U.S.C. § 2000e(j), which provides that religion "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Indiana concedes that the State Police must not discriminate against any religious faith but relies on *Employment Division v. Smith*, 494 U.S. 872 (1990), for the proposition that it need not accommodate religiously inspired practices adversely affected by rules that are neutral with respect to religion. To the extent an accommodation requirement extends beyond the first amendment, Indiana insists, it rests on the Constitution's commerce clause and not on § 5 of the fourteenth amendment. That does not undermine § 701(j)'s validity as applied to state employees, see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), but does affect where litigation must occur–for, when Congress acts only under the commerce power, the eleventh amendment permits states to insist that suit be in state court. Compare *Fitpatrick v. Bitzer*, 427 U.S. 445 (1976), with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In *Boerne v. Flores*, 521 U.S. 507 (1997), the Court concluded that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to § 2000b-4, exceeds the power granted by § 5 and therefore may not support a private action in federal court against a state. Indiana submits that § 701(j), which like the RFRA requires accommodation rather than neutrality, also is not § 5 legislation. After the United States intervened to defend the constitutionality of

Title VII, the district judge rejected Indiana's argument and held that litigation may proceed in federal court. *Endres v. Indiana State Police*, No. 3:01-CV-0518 (N.D. Ind. Dec. 28, 2001) (unpublished order). The state took an interlocutory appeal. See *Lapides v. University of Georgia*, 535 U.S. 613 (2002); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

Endres joined the State Police in 1991. After Indiana began to license casinos, the State Police designated some of its officers as Gaming Commission agents. In March 2000 Endres was assigned to a full-time position as an agent at the Blue Chip Casino in Michigan City, Indiana. Gaming Commission agents certify gambling revenue, investigate complaints from the public about the gaming system, and conduct licensing investigations for the casinos and their employees. Endres worships at the Community Baptist Church in South Bend; he and other congregants believe they must neither gamble nor help others to do so, because games of chance are sinful. Endres told the State Police that, although he was willing to enforce general vice laws at casinos, providing the specialized services required of Gaming Commission agents would violate his religious beliefs because it would facilitate gambling. He asked for a different assignment; the State Police declined. Endres then refused to report for duty and was fired for insubordination. An assignment to this position because of (rather than in spite of, or with indifference to) his religious beliefs would violate the Constitution, see *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), but Endres does not contend that his religion played any role in the selection. According to the complaint, he was selected by lot. Nor did the State Police hold his views against him after he refused the assignment; it responded to his deeds, not his faith, and Endres does not contend that he was treated more severely than he would have been had he refused the same position for secular reasons. As a result, neither the posting

nor the decision not to accommodate Endres's desire for different duties violated the free exercise clause of the first amendment, as *Smith* understands that clause.

Before taking up the question whether § 701(j) is an exercise of § 5 powers, we first inquire whether § 701(j) obliges states to afford the sort of accommodation that Endres requested. A negative answer will enable the court to avoid a constitutional issue, which makes it prudent to follow the model that the Supreme Court established in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), for qualified-immunity appeals by state actors: determine whether the complaint states a claim before inquiring whether the defendants have immunity. Because the eleventh amendment does not curtail subject-matter jurisdiction (if it did, states could not consent to litigate in federal court, as *Lapides* holds that they may), a court is free to tackle the issues in this order, when it makes sense to do so, without violating the rule that jurisdictional issues must be resolved ahead of the merits. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778-80 (2000).

Endres contends that § 701(j) gives law-enforcement personnel a right to choose which laws they will enforce, and whom they will protect from crime. Many officers have religious scruples about particular activities: to give just a few examples, Baptists oppose liquor as well as gambling, Roman Catholics oppose abortion, Jews and Muslims oppose the consumption of pork, and a few faiths (such as the one at issue in *Smith*) include hallucinogenic drugs in their worship and thus oppose legal prohibitions of those drugs. If Endres is right, all of these faiths, and more, must be accommodated by assigning believers to duties compatible with their principles. Does § 701(j) require the State Police to assign Unitarians to guard the abortion clinic, Catholics to prevent thefts from liquor stores, and Baptists to investigate claims that supermarkets mis-weigh bacon and shellfish? Must prostitutes be

left exposed to slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith?

The Supreme Court held in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), that § 701(j) does not require an accommodation that would cause more than minimal hardship to the employer or other employees. See also *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67-69 (1986). Juggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors. Whether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship, however, the demand would not be reasonable — and § 701(j) calls only for reasonable accommodations. Reasonableness and the avoidance of undue hardship are distinct. Cf. *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995) (discussing the difference between "reasonable" accommodation and "undue hardship" under the Americans with Disabilities Act). Selective objection to some of the employer's goals raises problems on the "reasonableness" branch as well as the "undue hardship" branch. See *Reed v. Great Lakes Cos.*, 330 F.3d 931 (7th Cir. 2003). This is especially pertinent when the assignment is unpopular: the State Police had to draft Endres because there were not enough volunteers. Excusing officers from the risk of unpopular assignments would create substantial costs for fellow officers who must step in, as well as the police force as an entity.

This is the third time we have had to consider how § 701(j) applies to requests by law-enforcement personnel to choose which crimes they will investigate and which potential victims they will protect. In *Ryan v. Department of Justice*, 950 F.2d 458 (7th Cir. 1991),

an FBI agent claimed a right to be free of any assignment concerning nonviolent opposition to military activities — such as, for example, protesters who vandalize military installations, see *United States v. Urfer*, 287 F.3d 663 (7th Cir. 2002), or pour blood on military records, see *United States v. Berrigan*, 437 F.2d 750 (4th Cir. 1971). Agent Ryan's views stemmed from the U.S. Bishops' Pastoral Letter on War and Peace; his sincerity was not in doubt. Nonetheless, we held, § 701(j) did not protect him from discharge for insubordination:

> It is difficult for any organization to accommodate employees, who are choosy about assignments; for a paramilitary organization the tension is even greater. Conscientious objectors in the military seek discharge, which accommodates their beliefs and the military's need for obedience. Ryan received discharge but does not want it. He wants to be an agent and to choose his assignments too. With good will all around, and flexibility on the part of Ryan's fellow agents, it just might be possible to make a go of it. Title VII does not, however, compel the FBI to attempt this. Legal institutions lack the sense of nuance that will tell an experienced agent how far the rules may be bent without injury to the FBI's mission. Compelled, as it is by Title VII, to have one rule for all of the diverse religious beliefs and practices in the United States, the FBI may choose to be stingy with exceptions lest the demand for them overwhelm it.

950 F.2d at 462. Our second case was *Rodriguez v. Chicago*, 156 F.3d 771 (7th Cir. 1998). Rodriguez, like Ryan a Roman Catholic, refused to protect abortion clinics and their clients. Again the sincerity of his views was unquestioned; again the officer lost, this time because an accommodation had been offered in the form of an opportunity to transfer to a precinct without abortion clinics

(which avoided the need to determine whether the offer had been required). Chief Judge Posner filed a concurring opinion addressing the question that the majority had ducked and concluding, in part on the authority of *Ryan*, that agencies such as police and fire departments designed to protect the public from danger may insist that *all* of their personnel protect *all* members of the public — that they leave their religious (and other) views behind so that they may serve all without favor on religious grounds. That is, after all, an obligation both state law and the Constitution fasten on the police. If police and fire departments must enforce the law and protect potential victims free of religious favoritism, then they may insist that all members of their forces (volunteers rather than conscripts) do their parts in fulfilling this duty. "[P]ublic protectors such as police and firefighters must be neutral in providing their services." *Shelton v. University of Medicine & Dentistry*, 223 F.3d 220, 228 (3d Cir. 2000).

Perhaps one could say that *Ryan* does not *compel* this conclusion; agent Ryan had been offered one form of accommodation (a swap of assignments with a fellow agent), and officer Endres lacked any similar way out. Yet what principally led to Ryan's discharge (as opposed to lesser discipline) was his failure to follow a direct order, coupled with a claim of entitlement in the future to choose which crimes would be investigated and which potential victims protected. Endres has made a claim of entitlement similar to Ryan's — broader to the extent that Endres claims a right to reject an entire job classification, while Ryan claimed only the right to reject particular investigations — and Endres's employer has not offered a similar accommodation. Certainly nothing in *Ryan* or *Rodriguez* implies that there *must* be such an offer: those cases deemed proffered accommodations adequate and did not reach the question whether any had been necessary. Here, where no accommodation was attempted, we must decide whether the statute requires one, and we hold that it does not. Endres has made a demand that it

would be unreasonable to require any police or fire department to tolerate.

Law-enforcement agencies need the cooperation of all members. Even if it proves possible to swap assignments on one occasion, another may arise when personnel are not available to cover for selective objectors, or when (as in *Hardison*) seniority systems or limits on overtime curtail the options for shuffling personnel. Beyond all of this is the need to hold police officers to their promise to enforce the law without favoritism — as judges take an oath to enforce *all* laws, without regard to their (or the litigants') social, political, or religious beliefs. Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police.

> The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty — that Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policemen protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policemen protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats. We judges certainly want to think that U.S. Marshals protect us from assaults and threats without regard to whether, for example, we vote for or against the pro-life position in abortion cases.

Rodriguez, 156 F.3d at 779 (Posner, C.J., concurring). And, we add, that Baptist policemen protect gamblers from theft and fraud (and casino operators from sticky-fingered gamblers and employees with falsified credentials). Cf. *Gillette v. United States*, 401 U.S.

437 (1971) (selective conscientious objection does not excuse military service).

Endres advanced a claim under 42 U.S.C. § 1983 as well as one under Title VII. The Indiana State Police, as a unit of state government, is not a "person" as § 1983 uses that term and therefore is not amenable to a suit for damages under that statute. See *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). There is no point in remanding to allow Endres to fix this problem by adding other defendants. His claim under the free exercise clause is incompatible with *Smith*, and only § 701(j) offered any prospect of success. The district court's disposition of Endres's suit therefore is reversed outright; his complaint fails to state a claim on which relief may be granted.

The decision of the district court is reversed, and the case is remanded with instructions to enter judgment for the State Police on the merits.

RIPPLE, *Circuit Judge*, with whom ROVNER and WILLIAMS, *Circuit Judges*, join, dissenting from the denial of rehearing en banc. Today, the court declines to rehear en banc a case that departs significantly from this court's fundamental approach to statutory interpretation. In doing so, it sets our court apart from the other circuits with respect to a fundamental aspect of Title VII law and deprives those who serve us in important public safety positions from a protection that they enjoy in every other circuit in the United States. For the reasons set forth in the following paragraphs, I respectfully dissent from the denial of rehearing en banc.

Benjamin Endres was an officer for the Indiana State Police. After Indiana began to license casinos, the State Police designated some of its officers as Gaming Commission Agents. In March 2000, Mr. Endres was designated as a Gaming Commission Agent and was

assigned *full time* to the Blue Chip Casino in Michigan City, Indiana. Mr. Endres is a Baptist; he believes that gambling is a sin and that he must neither gamble nor help others to do so. As admitted by the court, although Mr. Endres did not object to enforcing general vice laws on casino property, Mr. Endres informed his supervisors that providing full-time services at the casino would violate his religious beliefs; he, therefore, requested a different assignment. The State Police refused. When Mr. Endres failed to report for duty, he was fired for insubordination. Mr. Endres subsequently filed suit under Title VII and claimed that the State of Indiana failed to accommodate reasonably his religious beliefs.

In addressing his claim, the panel first noted, correctly, that "§ 701(j) does not require an accommodation that would cause more than minimal hardship to the employer or other employees." *Endres v. Indiana State Police*, No. 02-1247, slip op. at 5 (7th Cir. Nov. 19, 2003) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

However, it then continued:

> Juggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors. Whether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship, however, the demand would not be reasonable — and § 701(j) calls only for reasonable accommodations.

Id. Comparing Mr. Endres' request to that of the plaintiff in *Ryan v. Department of Justice*, 950 F.2d 458 (7th Cir. 1991), the panel

held that such a request is per se unreasonable in the context of a police or fire department. *See id.* at 5-6.

The panel's disposition of Mr. Endres' accommodation claim contains several crucial errors. First, the panel recharacterizes the scope of the accommodation that Mr. Endres sought. Mr. Endres simply asked that he not be assigned on a permanent, full-time basis to a gambling establishment; he did not seek to avoid all law enforcement activity with respect to a casino. Consequently, his request did not either require the ongoing "[j]uggling [of] assignments" or involve an officer choosing which law he would enforce — elements of Mr. Endres' claim that the panel found so troubling.

The panel's resolution also fails to adhere to the established law of this and every other circuit. Employing a less polemical characterization, this court has twice addressed accommodations that must be offered to law enforcement personnel who seek to avoid specific assignments on religious grounds. Most recently in *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998), we addressed the request of a Catholic police officer to be exempted from assignments at abortion clinics. In evaluating the City's alleged failure to accommodate, we reiterated the standard to be applied:

> Under Title VII, therefore, an employer must reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business. Accordingly, we turn first to the issue of whether the City has satisfied its duty of reasonable accommodation; only if we answer that question in the negative need we proceed to the "undue hardship" prong of the Title VII analysis.

Id. at 775. Applying this standard, we determined that the City had satisfied its duty of reasonable accommodation because, under the existing collective bargaining agreement, the officer in question could have secured a transfer to a district without an abortion clinic without any reduction in his level of pay or benefits. *See id.* In an earlier case, *Ryan v. United States Department of Justice*, 950 F.2d 458 (7th Cir. 1991), we reached a similar conclusion. Ryan was a Federal Bureau of Investigation agent who, on religious grounds, "repeatedly refused to carry out a lawful order to investigate an unsolved federal offense; he declined to swap assignments; he would not promise to carry out similar orders in the future...." 950 F.2d at 461. Although seeking to be removed from the investigation of any peaceful, antiwar protestors, "Ryan proposed no course other than discontinuing investigations of the sort to which he is opposed, which would be capitulation rather than accommodation." *Id.* Under these circumstances, we determined the FBI had not failed to accommodate Ryan's religious beliefs.

Notably absent from our resolution of either Rodriguez's or Ryan's claim, however, was a holding that the agencies were exempt from the statutory requirement of reasonable accommodation because of their law enforcement mission. Indeed, the panel in *Endres* acknowledges that "*Ryan* does not *compel*" its conclusion. *Endres*, slip op. at 8. Quite the opposite, *Ryan* acknowledged the unreasonableness of the request to cease investigations when the perfectly reasonable solution of an assignment swap had been proposed and rejected.

Not only does the panel's decision here abandon the analytical framework of *Rodriguez* and *Ryan*, it also ignores the clear language of the statute. It simply blue pencils the reasonable accommodation requirement from the statute as it applies to police and fire personnel. It relies on no language of the statute, no

interpretive regulation, no legislative history. It simply constructs a categorical statutory amendment where none exists. Congress took a different view. Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...religion." 42 U.S.C. § 2000e-2(a)(1). Furthermore, Title VII's definition of religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate...an employee's...religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). Neither the definition of religion nor the definition of employer in § 2000e(b), suggests that law enforcement agencies, fire departments, or any other "paramilitary" employers are exempt from the reasonable accommodation provisions. Consequently, a law enforcement exception to the reasonable accommodation requirement finds no support in the plain language of Title VII.

I have no doubt that public safety agencies have a great deal of latitude in accommodating the religiously based requests of their employees for exemptions from particular duties. Both our previous case law and the case law of the other circuits make that proposition clear.[1] But Congress simply did not determine that

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1 *See, e.g., Shelton v. Univiversity of Medical & Dentistry of New Jersey*, 223 F.3d 220, 228 (3d Cir. 2000) (finding public hospital had reasonably accommodated Pentecostal nurse opposed to assisting with emergency abortions by offering her different assignment); *Beadle v. City of Tampa*, 42 F.3d 633, 637 (11th Cir. 1995) (applying reasonable accommodation analysis and holding that excusing Seventh Day Adventist officer from all Friday evening and Saturday shifts would work an undue hardship); *Miller v. Drennon*

these agencies ought to be given a blanket exemption from the mandate of the statute, and, I respectfully suggest, Congress' ability to determine the wisdom of such an exemption is far superior to ours. On a nationwide scale, public safety organizations come in many shapes and sizes. Some are highly professional; some are not. Some are relatively immune from prejudices, be they racial or religious or otherwise; some are not. Congress apparently saw no reason to exempt categorically such organizations from the plain mandate of the statute and preferred that the boundaries of the reasonable accommodation requirement be established in case-by-case adjudication.

The court's decision to let this panel decision stand will raise, regretfully, many questions in the minds of many people. Public safety and emergency personnel, whose contributions to our daily lives are so much more appreciated these days, have every right to ask why this court has signaled them out as not deserving of a statutory protection guaranteed to every other person in the United States. Members of minority religions, whose doctrines are not well-understood or appreciated in our culture, may well wonder whether municipalities within this circuit are the best place in which to make a public contribution. Hopefully, these doubts will be lessened by enlightened municipal management who certainly could ensure that those who serve us are protected despite this court's decision to depart from the anti-discrimination standards enforced in the rest of the United States.

1992 WL 137578 (4th Cir. June 19, 1992) (applying reasonable accommodation analysis and finding that county had offered reasonable accommodations to emergency medical worker who was opposed to sharing one-room apartment with a member of the opposite sex when on twenty-four hour shifts).

Members of the practicing judiciary and the practicing bar in this circuit also will be puzzled by this court's departure from its usual methodology in interpreting statutes. Time and time again, we profess that, in interpreting a statute, we begin with the plain wording of the statute. Unless there is an ambiguity, we apply the explicit command of Congress. No one suggests that Congress has left any doubt as to what it expects in this situation. Unfortunately, however, our current decisional behavior does not follow the course of our rhetoric. In future cases, judges, attorneys, and litigants will have to accept the reality that they must observe not what we say, but what we do.

B1

BENJAMIN P. ENDRES, JR., Plaintiff-Appellee, and UNITED STATES OF AMERICA, Intervening Plaintiff-Appellee, v. INDIANA STATE POLICE, Defendant-Appellant. PATRICIA HOLMES, Plaintiff-Appellee, and UNITED STATES OF AMERICA, Intervening Plaintiff-Appellee, v. MARION COUNTY OFFICE OF FAMILY AND CHILDREN, Defendant-Appellant.

Nos. 02-1247, 02-1377
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

334 F.3d 618

November 1, 2002, Argued
June 27, 2003, Decided

Before BAUER, POSNER, and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Benjamin Endres lost his job with the Indiana State Police after he refused to work at a casino, an enterprise that contravenes his religious beliefs. Patricia Holmes, an employee of Indiana's child welfare system, took two days of paid leave rather than comply with a directive to remove a headwrap required by her faith. Endres and Holmes have sued under Title VII of the Civil Rights Act of 1964, contending that Indiana discriminated against them on account of their religion. Plaintiffs rely on a definition in § 701(j) of that Act, 42 U.S.C. § 2000e(j), which provides that religion "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's

religious observance or practice without undue hardship on the conduct of the employer's business."

Both defendants concede that they have a duty not to discriminate against any religious faith but rely on *Employment Division v. Smith*, 494 U.S. 872 (1990), for the proposition that they need not accommodate religiously inspired practices adversely affected by rules that are neutral with respect to religion. To the extent an accommodation requirement extends beyond the first amendment, defendants insist, it rests on the Constitution's commerce clause and not on § 5 of the fourteenth amendment. That does not undermine § 701(j)'s validity as applied to state employees, see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), but does affect where litigation must occur — for, when Congress acts only under the commerce power, the eleventh amendment permits states to insist that suit be in state court. Compare *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In *Boerne v. Flores*, 521 U.S. 507 (1997), the Court concluded that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to § 20000bb-4, exceeds the power granted by § 5 and therefore may not support a private action in federal court against a state. Defendants submit that § 701(j), which like the RFRA requires accommodation rather than neutrality, also is not § 5 legislation. After the United States intervened to defend the constitutionality of Title VII, each district judge rejected Indiana's argument and held that litigation may proceed in federal court. *Endres v. Indiana State Police*, No. 3:01-CV-0518 (N.D. Ind. Dec. 28, 2001) (unpublished order); *Holmes v. Marion County Office of Family and Children*, 184 F. Supp. 2d 828 (S.D. Ind. 2002). Defendants took interlocutory appeals. See *Lapides v. University of Georgia*, 535 U.S. 613 (2002); *Puerto Rico Aqueduct & Sewer Authority v. Metcald & Eddy, Inc.*, 506 U.S. 139 (1993). We consolidated the cases for briefing and argument.

I.

Endres joined the State Police in 1991. After Indiana began to license casinos, the State Police designated some of its officers as Gaming Commission agents. In March 2000 Endres was assigned to a full-time position as an agent at the Blue Chip Casino in Michigan City, Indiana. Endres worships at the Community Baptist Church in South Bend; he and other congregants believe they must neither gamble nor help others to do so, because games of chance are sinful. Endres told the State Police that providing law-enforcement services at a casino would violate his religious beliefs because it would facilitate gambling. He asked for a different assignment; the State Police declined. Endres then refused to report for duty and was fired for insubordination. The record does not reflect why Endres was deputed as a Gaming Commission agent, but he does not contend that this occurred because of, rather than in spite of, his religiously based opposition to gambling. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Nor did the State Police hold his views against him; it responded to his deeds, not his faith, and Endres does not contend that he was treated more severely than he would have been had he refused the same assignment for secular reasons. As a result, neither the posting nor the decision not to accommodate Endres's desire for different duties violated the free exercise clause of the first amendment, as *Smith* understands that clause.

Before taking up the question whether § 701(j) is an exercise of § 5 powers, we first inquire whether § 701(j) obliges states to afford the sort of accommodation that Endres requested. A negative answer will enable the court to avoid a constitutional issue, which makes it prudent to follow the model that the Supreme Court established in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), for qualified-immunity appeals by state actors: determine whether the

complaint states a claim before inquiring whether the defendants have immunity. Because the eleventh amendment does not curtail subject matter jurisdiction (if it did, states could not consent to litigate in federal court, as *Lapides* holds that they may), a court is free to tackle the issues in this order, when it makes sense to do so, without violating the rule that jurisdictional issues must be resolved ahead of the merits. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778-80 (2000).

Endres contends that § 701(j) gives law-enforcement personnel a right to choose which laws they will enforce, and whom they will protect from crime. Many officers have religious scruples about particular activities: to give just a few examples, Baptists oppose liquor as well as gambling, Roman Catholics oppose abortion, Jews and Muslims oppose the consumption of pork, and a few faiths (such as the one at issue in *Smith*) include hallucinogenic drugs in their worship and thus oppose legal prohibitions of those drugs. If Endres is right, all of these faiths, and more, must be accommodated by assigning believers to duties compatible with their principles. Does § 701(j) require the State Police to assign Unitarians to guard the abortion clinic, Catholics to prevent thefts from liquor stores, and Baptists to investigate claims that supermarkets mis-weigh bacon and shellfish? Must prostitutes be left exposed to slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith?

The Supreme Court held in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), that § 701(j) does not require an accommodation that would cause more than minimal hardship to the employer or other employees. See also *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67-69 (1986). Juggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to

managers and difficult for other officers who would be called on to fill in for the objectors. Whether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship, however, the demand would not be reasonable — and § 701(j) calls only for reasonable accommodations. Reasonableness and the avoidance of undue hardship are distinct. Cf. *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995) (discussing the difference between "reasonable" accommodation and "undue hardship" under the Americans with Disabilities Act). Selective objection to some of the employer's goals raises problems on the "reasonableness" branch as well as the "undue hardship" branch. See *Reed v. Great Lakes Cos.*, 330 F.3d 931 (7th Cir. 2003).

This is the third time we have had to consider how § 701(j) applies to requests by law-enforcement personnel to choose which crimes they will investigate and which potential victims they will protect. In *Ryan v. Department Of Justice*, 950 F.2d 458 (7th Cir. 1991), an FBI agent claimed a right to be free of any assignment concerning nonviolent opposition to military activities — such as, for example, protesters who vandalize military installations, see *United States v. Urfer*, 287 F.3d 663 (7th Cir. 2002), or pour blood on military records, see *United States v. Berrigan*, 437 F.2d 750 (4th Cir. 1971). Agent Ryan's views stemmed from the U.S. Bishops' Pastoral Letter on War and Peace; his sincerity was not in doubt. Nonetheless, we held, § 701(j) did not protect him from discharge for insubordination:

> It is difficult for any organization to accommodate employees who are choosy about assignments; for a paramilitary organization the tension is even greater. Conscientious objectors in the military seek discharge, which accommodates their beliefs and the military's need for obedience. Ryan received discharge but does not want

> it. He wants to be an agent and to choose his assignments too. With good will all around, and flexibility on the part of Ryan's fellow agents, it just might be possible to make a go of it. Title VII does not, however, compel the FBI to attempt this. Legal institutions lack the sense of nuance that will tell an experienced agent how far the rules may be bent without injury to the FBI's mission. Compelled, as it is by Title VII, to have one rule for all of the diverse religious beliefs and practices in the United States, the FBI may choose to be stingy with exceptions lest the demand for them overwhelm it.

950 F.2d at 462. Our second case was *Rodriguez v. Chicago*, 156 F.3d 771 (7th Cir. 1998). Rodriguez, like Ryan a Roman Catholic, refused to protect abortion clinics and their clients. Again the sincerity of his views was unquestioned; again the officer lost, this time because an accommodation had been offered in the form of an opportunity to transfer to a precinct without abortion clinics (which avoided the need to determine whether the offer had been required). Chief Judge Posner filed a concurring opinion addressing the question that the majority had ducked and concluding, in part on the authority of *Ryan*, that agencies such as police and fire departments designed to protect the public from danger may insist that *all* of their personnel protect *all* members of the public — that they leave their religious (and other) views behind so that they may serve all without favor on religious grounds. That is, after all, an obligation both state law and the Constitution fasten on the police. If police and fire departments must enforce the law and protect potential victims free of religious favoritism, then they may insist that all members of their forces (volunteers rather than conscripts) do their parts in fulfilling this duty. "[P]ublic protectors such as police and firefighters must be neutral in providing their services." *Shelton v. University of Medicine & Dentistry*, 223 F.3d 220, 228 (3d Cir. 2000).

Perhaps one could say that *Ryan* does not *compel* this conclusion; agent Ryan had been offered one form of accommodation (a swap of assignments with a fellow agent), and officer Endres lacked any similar way out. Yet what principally led to Ryan's discharge (as opposed to lesser discipline) was his failure to follow a direct order, coupled with a claim of entitlement in the future to choose which crimes would be investigated and which potential victims protected. Endres has made the same claim of entitlement as Ryan did; it is, we hold, a claim that it would be unreasonable to require any police or fire department to tolerate.

Law-enforcement agencies need the cooperation of all members. Even if it proves possible to swap assignments on one occasion, another may arise when personnel are not available to cover for selective objectors, or when (as in *Hardison*) seniority systems or limits on overtime curtail the options for shuffling personnel. Beyond all of this is the need to hold police officers to their promise to enforce the law without favoritism — as judges take an oath to enforce *all* laws, without regard to their (or the litigants') social, political, or religious beliefs. Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police.

> The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty — that Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policemen protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policemen protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats. We

> judges certainly want to think that U.S. Marshals protect us from assaults and threats without regard to whether, for example, we vote for or against the pro-life position in abortion cases.

Rodriguez, 156 F.3d at 779 (Posner, C.J., concurring). And, we add, that Baptist policemen protect gamblers from theft and fraud (and casino operators from sticky-fingered gamblers and employees). Cf. *Gillette v. United States*, 401 U.S. 437 (1971) (selective conscientious objection does not excuse military service).

Endres advanced a claim under 42 U.S.C. § 1983 as well as one under Title VII. The Indiana State Police, as a unit of state government, is not a "person" as § 1983 uses that term and therefore is not amenable to a suit for damages under that statute. See *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). There is no point in remanding to allow Endres to fix this problem by adding other defendants. His claim under the free exercise clause is incompatible with *Smith*, and only § 701(j) offered any prospect of success. The district court's disposition of Endres's suit therefore is reversed outright; his complaint fails to state a claim on which relief may be granted.

II

Holmes has a much better claim for accommodation. Her complaint, the only thing we have to go on, alleges: "August 13, 1998, I wore a geles (headwrap) as part of my religious practice. My supervisor, Teresa Howard, informed me if I didn't remove my headgear I would be written up for insubordination for violating a dress code policy. I informed Ms. Howard that due to religious reasons I could not take my geles off. I had to take two vacation days to avoid being disciplined." Although the Constitution does not compel a public employer to allow religious headcoverings that

violate neutral dress codes, see *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Menora v. Illinois High School Association*, 683 F.2d 1030 (7th Cir. 1982), toleration of religious diversity in this respect is a wise policy in a pluralistic society. See *United States v. James*, 328 F.3d 953, 957-58 (7th Cir. 2003). Accommodation would be reasonable. Whether Indiana could establish "undue hardship" is not at issue this early in the case. It is enough to say that the complaint survives any challenge under Rule 12(b)(6), so we must decide whether further litigation takes place in state rather than federal court.

A

Before doing this, however, we need to say more about our own jurisdiction. There are two potential problems, even taking as given the holding of *Lapides* and *Puerto Rico Aqueduct & Sewer Authority* that a state's invocation of the eleventh amendment normally permits an interlocutory appeal.

The first is that the case is in federal court to stay. Holmes alleged, after the language we have quoted: "Other employees wore headgear or hats and were not threatened as I was." That disparate-treatment claim does not depend on the accommodation rule in § 701(j). Indiana concedes that it may be litigated in federal court, because Title VII is § 5 legislation to the extent it enforces the Constitution's own rule against religious discrimination. One may wonder what sense it makes to entertain an interlocutory appeal about a single line of legal argument even though another theory requires the same defendant to litigate in the same court no matter how the appeal comes out. Holmes advances only one claim for relief, supported by multiple legal theories, each of which (if successful) would lead to the same money damages: two days' pay. But *Behrens v. Pelletier*, 516 U.S. 299, 311-12 (1996), says that an interlocutory immunity appeal may contest a single theory of

liability, even though success will not end the case, at least if the potential relief differs — and Holmes's victory on an accommodation theory would lead to prospective relief different from what would follow victory on a disparate-treatment theory. After *Behrens*, the fact that a defendant is not asserting an unqualified "right not to be tried in federal court" does not preclude an interlocutory appeal based on a claim of immunity.

Second, and more complex, is the question whether the Marion County Office of Family and Children, the defendant in Holmes's suit, *is* the State of Indiana. If, as its name implies, it is a unit of county rather than state government, then it gets no benefit from the eleventh amendment, see *Lincoln County v. Luning*, 133 U.S. 529 (1890), and is amenable to suit in federal court whether or not § 701(j) "enforces" the fourteenth amendment. See *University of Alabama v. Garrett*, 531 U.S. 356, 368 (2001).

Twenty-five years ago we ruled that Indiana's county welfare departments are not "the state" for purposes of the eleventh amendment. See *Mackey v. Stanton*, 586 F.2d 1126, 1130-31 (7th Cir. 1978). In 1986 Indiana revised the organization of its child-welfare system; county welfare departments became county offices of family and children, and their workers became state employees. *Baxter v. Vigo County School Corporation*, 26 F.3d 728, 732-33 (7th Cir. 1994), holds that these changes do not affect *Mackey*'s conclusion: these organizations are still units of local rather than state government, principally because the money to pay for child-welfare services comes from local taxes.

Relying on *J.A.W. v. Indiana*, 687 N.E. 2d 1202 (Ind. 1997), the state asks us to overrule *Baxter*. The Supreme Court of Indiana concluded in *J.A.W.* that we misunderstood how the state's child-welfare system is organized after the 1986 legislation. That law, *J.A.W.* concluded, made all family-welfare officials full-fledged state

employees in a chain of command that extends to the Governor. All of these workers are paid directly from the state treasury. County offices are part of the state in such a structure in the same way the Indianapolis office of the Department of Health and Human Services is part of the federal government. Some taxes to raise funds for welfare benefits are collected at the local level, but *J.A.W.* holds that the county acts in this respect as an agent of the state: "county governments were largely rendered tax collectors for the State" (687 N.E.2d at 1213). "When the county departments were transformed into subordinate agencies of the state[] in 1986, the county governments became — with respect to these activities — financial agents of the state. We so hold as a matter of state law." *Id.* at 1215.

Indiana's system brings to mind the way the United States apportioned direct taxes among the states before the sixteenth amendment. Sharing of authority among units of government complicates both practical administration and legal characterization. Even if as a matter of state law the counties act as agents of the state in raising and remitting revenues, it remains a matter of federal law whether this makes each county's department part of the State. See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). The dispositive question is more "who pays?" than "who raised the money?". See *University of California v. Doe*, 519 U.S. 425 (1997) (if state pays, the fact that the money came to the state from the federal Treasury does not matter). We need not decide whether *J.A.W.* alone would cause us to overturn the holding of *Baxter*, however, because Indiana changed its law again in 2000.

Baxter relied principally on I.C. 12-19-3-2, which established a welfare fund in each county. The fund was raised by a tax on all taxable property in the county, plus the issuance of bonds secured by future property taxes, see I.C. 12-19-3-12 through 12-19-3-16.

These provisions were repealed effective January 1, 2000, by I.C. 12-19-1-21. Counties still have the ability to levy taxes to fund certain services (the fund is called the "family and children's fund"), but that money is used only for "child services." I.C. 12-19-7-3. "Child services" is a defined term, see I.C. 12-19-7-1, that does not include any personnel or administrative costs. These come exclusively from the state treasury. See I.C. 12-19-1-8 and 12-19-1-9. The damages Holmes seeks therefore would be paid by the state itself. (The events of which she complains occurred in 1998, but Indiana charges damages against current appropriations). The combination of *J.A.W.* and the 2000 legislation leads us to conclude that county offices of family and children in Indiana now must be classified as part of the state for purposes of the eleventh amendment. This does not require the overruling of *Baxter*, which dealt with superseded legislation. It is enough to say that the statutes now in force makes county offices part of the state, as *J.A.W.* held and as the formal organization chart now shows them.

B

Thus we arrive at the question whether a claim against a state, based on the accommodation clause of § 701(j), may be litigated in federal court. The parties' dispute concerns venue, not substance: it is the validity of § 701(a), to the extent it authorizes private parties to sue a state in federal court, and *not* the validity of § 701(j), that is at issue — for legislation based on the commerce clause may be applied to states (as employers) via suits brought by the federal government in federal court, or via private suits in state courts that are already open to litigation against the state. See *Alden v. Maine*, 527 U.S. 706 (1999).

Indiana's argument is a simple one. Section 5 of the fourteenth amendment authorizes Congress to "enforce" the other provisions of that amendment. A requirement of accommodation does not

"enforce" the free exercise clause (applied to the states by § 1 of the fourteenth amendment), for *Smith* holds that a state complies with the free exercise clause by maintaining neutrality toward religiously motivated practices. Accommodation means *departure* from neutrality, and *Boerne* accordingly holds that the Religious Freedom Restoration Act is not based on the power to "enforce" the fourteenth amendment. In *Boerne* not a single justice thought that a statutory demand for accommodation could be deemed a law to "enforce" the free exercise clause as *Smith* had interpreted it; the only seriously debated question was whether to overrule *Smith* (which the Court did not do). Likewise *Garrett* holds that the Americans with Disabilities Act, to the extent it requires accommodation rather than disregard of disabilities, does not rest on the § 5 enforcement power. See also *Erickson v. Northeastern Illinois University*, 207 F.3d 945 (7th Cir. 2000). Indiana asks us to equate accommodation under § 701(j) with accommodation under the RFRA and the ADA.

Plaintiffs and the United States reply that § 701(j) can be enforcement legislation even though it departs from the Constitution's own rules, provided that it is "congruent and proportional" to them — in other words, that it is a reasonable way to prevent evasions of constitutional rules. See *Nevada Department of Human Resources v. Hibbs* 1972 (2003), which holds that the family-leave provisions of the Family and Medical Leave Act may be sustained under the § 5 power because they root out sex-based stereotypes. The Court stressed in *Hibbs* that Congress compiled a legislative record showing that many states used to discriminate explicitly on account of sex and may continue to do so (either subconsciously or deliberately but in disguise) in the absence of preventive legislation. Family leave is "congruent" to the constitutional rule because designed to reduce the scope for stereotypical thinking and "proportional" because it imposes a modest requirement: family leave is limited in time and is unpaid.

Limits built into § 701(j) satisfy the proportionality element of this analysis: § 701(j) demands much less of a state than the RFRA did (and less than the FMLA does, too). The RFRA demanded that the state show a compelling interest, while under *Hardison* even a slight burden is "undue hardship." Yet the employer's burden under § 701(j) is identical to that under the ADA, which *Garrett* held to be unsupported by § 5. So we must inquire whether § 701(j) is "congruent" to the free exercise clause, even though the RFRA was not (and the ADA's accommodation rule has been held not congruent to the equal protection clause).

The idea behind "congruence" is that Congress may respond to a history of concealable violations by adopting precautionary rules that reduce either the chance of evasion or the influence of lingering stereotypical beliefs. Congress can't change the constitutional rule of decision, but it may add teeth so that the Constitution's rule has practical bite. Many violations of the equal protection clause are concealable, for disparate impact is not actionable, and the disparate-treatment rule requires proof of intent to use the forbidden characteristic. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). When stereotypical thinking underlies a decision, the line between disparate treatment and disparate impact blurs, and it may be difficult indeed to prove a claim. The Court held in *Hibbs* that, when a history of real discrimination has been documented, § 5 permits Congress to address established patterns of stereotypical thinking without requiring proof of discriminatory intent.

Section 701(j) does not fit that model. Discrimination by public employers against their employees' religiously inspired practices does not have the same history as discrimination on account of race or sex, and states rarely have resorted to legislation with a veneer of neutrality designed to mask a forbidden discriminatory plan. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), offers one of the few examples — and as it was not enough

to persuade the Court that the RFRA matches a constitutional problem, it is hard to see why § 701(j) would be congruent to a constitutional problem. (Note that *Lukumi Babalu Aye* itself had nothing to do with employment by state agencies.) *Hibbs* stressed that, before enacting the FMLA, Congress had compiled a record of subtle sex discrimination reflected in employers' leave policies. Before enacting Title VII, Congress had not compiled such a record of subtle discrimination against religious practices. In 1964, the legislature concentrated on race discrimination; religion and sex were afterthoughts. There was no legislative record at all in the Senate, where the bill was not referred to committee, lest it be bottled up by opponents.

The United States concedes that before enacting Title VII Congress did not compile *any* legislative record on the question whether states were violating their constitutional obligations with respect to religious practices in public workplaces. If the history were written elsewhere for all to see, as the history of race and sex discrimination is, then the lack of a legislative record could not matter. Often a "legislative record" reflects only the ability of advocacy groups to have favorable tidbits recited by tame witnesses during staged hearings. Members of Congress are not professional historians; they do not conduct scholarly research or even make findings after the fashion of juries. Legislative "records" are compiled but not evaluated, voted on, or presented to the President (or the judiciary) for approval. Section 5 does not condition legislative power on the ability of interest groups or committee chairmen to ladle anecdotes into hearing transcripts. Legislative power under § 5 depends on the state of the world, not the state of the Congressional Record.

Yet the Executive Branch did not file in this court a brief that supplies the details missing from the legislative record; nor does the United States' brief point to any scholarly writings that illuminate the history. We have been given no reason whatever to think that

subtle, hard-to-catch, discrimination against religious practices is now, or ever has been, a problem in state employment. Although hostility to Catholicism was common in many states during the nineteenth century, and some states adopted local versions of the Blaine Amendment, see *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion), that period was behind us long before the enactment of Title VII. For much of the twentieth century, public employers *counteracted* religious discrimination in the private sector, hiring those who had difficulty finding private jobs suited to their skills. The foundation for a decision such as *Hibbs* is missing with respect to § 701(j).

Logic does not furnish what history lacks. An accommodation requirement does not reinforce the constitutional approach; to the contrary, neutrality (which is both necessary to avoid disparate treatment and, under *Smith*, sufficient to avoid any violation) differs substantially from accommodation. Neutrality is blind to religion; accommodation requires consciousness of religion and entails a demand that believers and non-believers receive different treatment. One Justice believes that, for this reason, accommodation is itself a violation of the establishment clause. See *Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring). Though this is a minority view, all of the other Justices recognize that there is a difference and a potential tension between an anti-discrimination rule and an accommodation requirement. So in the absence of some need to use accommodation to counteract evasions of the anti-discrimination principle, § 701(j) cannot be called an ancillary rule that is congruent with the constitutional norm that Congress is entitled to enforce. This means that § 701(j) rests on the commerce clause alone, and that § 701(a) therefore may not be used to compel a state to defend in federal court a private suit seeking accommodation of a religious practice. Holmes has not named any state official as a defendant in order to seek prospective relief, contrast *Bruggeman v. Blagojevich*, 324 F.3d 906, 912-13 (7th

Cir. 2003) (discussing the application of *Ex parte Young*, 209 U.S. 123 (1908)), so all variations of the accommodation theory belong in state court.

The decision of the district court in *Endres* is reversed, and that case is remanded with instructions to enter judgment for the State Police on the merits. The decision of the district court in *Holmes* is vacated, and that case is remanded with instructions to dismiss that portion of the complaint that deals with failure to accommodate, while retaining that portion of the complaint that deals with disparate treatment.

C1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

BENJAMIN P. ENDRES, JR.,	)	
	)	
Plaintiff,	)	
	)	
	)	Cause No. 3:01-CV-0518
INDIANA STATE POLICE,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Benjamin Endres says that when the Indiana State Police fired him for refusing to guard a casino, the police violated his right to reasonable accommodation of his religious beliefs, a right protected by federal employment laws. Mr. Endres also says that the firing breached his employment contract. Because the court disagrees with the State Police's argument that Congress had no authority to require states to make reasonable efforts to accommodate their employees' religious beliefs, the court denies the motion to dismiss Mr. Endres's claim under federal law. Because the constitution prohibits federal courts from deciding cases brought against states under state law, the court grants the motion to dismiss Mr. Endres's breach of contract claim.

Mr. Endres, a member of the Community Baptist Church, believes that gambling is a vice that contravenes his deeply held religious principles. Some time after Mr. Endres became an Indiana State Police officer in 1991, the State Police entered into an

agreement with the Indiana Gaming Commission under which the State Police would supply officers to act as Gaming Commission agents at Indiana casinos. In March 2000, the State Police assigned Mr. Endres as a Gaming Commission Agent at the Blue Chip Casino. Mr. Endres protested the assignment and told the State Police that his religious beliefs prevented him from taking the assignment. The State Police refused Mr. Endres's request to accommodate him by finding him another assignment. Mr. Endres declined to accept the assignment to work at the casino and was fired for refusing to comply with orders.

Mr. Endres alleges that the State Police refused to accommodate him, then fired him, because of his religious convictions.[1] He says his firing contravenes Title VII, 42 U.S.C. § 1983, and Indiana's civil rights act. Ind. Code 22-9-1-3. Mr. Endres also says his firing breached his employment contract with the State Police.

The State Police moved to dismiss Benjamin Endres' complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The State Police asked the court to direct the United States to intervene because its motion challenged the constitutionality of an Act of Congress, specifically 42 U.S.C. §

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1 The State Police say Mr. Endres's claim is based only on failure to accommodate and not on disparate treatment, so the court need only address his failure to accommodate claim. To assert a disparate treatment claim, a plaintiff must allege that his employer discriminated against him with respect to his compensation, terms, condition, or privileges of employment" because of his religion." 42 U.S.C. § 2000e-2(a). Mr. Endres's complaint is entitled to a reading in his favor, and when so read, alleges that he was forced to quit because of the consequences of his religious beliefs.

2000e(j). The court granted the United States' motion to intervene, and the United States filed its brief in support of the constitutionality of 42 U.S.C. § 2000e(j).

The State Police don't address Mr. Endres' state civil rights claim, but say the court should dismiss his federal religious discrimination claims because Congress exceeded its authority by abrogating the states' Eleventh Amendment immunity when it made it unlawful for states to discriminate on the basis of religion. The State Police also say that the Eleventh Amendment bars Mr. Endres's breach of contract claim.

> Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...religion. Religion, in turn, includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate...an employee's...religious observance or practice without undue hardship on the conduct of the employer's business. Under Title VII, therefore, an employer must reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business.

Rodriguez v. City of Chicago, 156 F.3d 771, 775 (7th Cir. 1998) (citations omitted).

Under the Eleventh Amendment to the United States Constitution, a state can't be sued in federal court by any individual — including its own citizens — without its consent. *Varner v.*

Illinois State University, 226 F.3d 927, 929 (7th Cir. 2000). States are immune from having to defend suits by private parties in federal courts, except when Congress "unequivocally expresses its intent to abrogate the immunity." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996). Congress's power of abrogation is limited; for the constitutional protection to be deemed abrogated, Congress must have acted "pursuant to a valid exercise of power." *Seminole Tribe v. Florida*, 517 U.S. at 55.

In abrogating the states' immunity from suit under Title VII, Congress exercised its power to enforce the Fourteenth Amendment, which gives Congress the power to enforce that Amendment by appropriate legislation. U.S. CONST. AMEND. 14 § 5. The State Police concede that Congress intended Title VII to apply to the states as defendants when it amended the act in 1972, *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976), so the sole question for the court is whether Congress validly exercised its § 5 power when it prohibited religious discrimination by states under Title VII. *See Varner v. Illinois State*, 226 F.3d at 930.

"Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Varner v. Illinois State*, 226 F.3d at 930 *quoting City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). "Congress' power to enforce the Fourteenth Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Varner v. Illinois State*, 226 F.3d at 930 *citing Kimel v. Florida Board of Regents*, 528 U.S. 62, 63 (2000). Congress's power under § 5 is limited to enforcing the restrictions set out by the Fourteenth Amendment; it doesn't give Congress the authority to determine what is or is not a

Constitutional violation. *Varner v. Illinois State*, 226 F.3d at 930.

For Congress's exercise of its § 5 authority to be valid, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997). The State Police say Congress didn't satisfy this test because the legislative record of 42 U.S.C. § 2000e(j) doesn't reveal evidence of a pattern of religious discrimination in this country and because the remedies Congress provided for under Title VII are out of proportion to the harm it seeks to remedy. The State Police say the court should overturn this provision of Title VII for the same reason that the Supreme Court overturned the Religious Freedom Restoration Act. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

Congress does not need to make a legislative record of a need for remedial legislation to act under § 5 of the Fourteenth Amendment. "Congress can enact legislation under § 5 enforcing the constitutional right to free exercise of religion." *City of Boerne v. Flores*, 521 U.S. at 519. The question is whether the scheme of the challenged law is remedial, preventative, or "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior." *City of Boerne v. Flores*, 521 U.S. at 532. The line is not always easy to draw, so Congress is afforded "wide latitude in determining where it lies." *City of Boerne v. Flores*, 521 U.S. at 519-520.

The State Police say Title VII's prohibition on religious discrimination is similar to that in RFRA, which prohibited state and local governments from "substantially burdening" one's exercise of religion---even if the burden took the form of facially neutral legislation ---unless the government could demonstrate its action is in furtherance of a compelling government interest and that its action

was the least restrictive means of furthering that interest. *City of Boerne v. Flores*, 521 U.S. at 515-516. Congress exceeded its § 5 authority in enacting RFRA because the law was an attempt to create a substantive change in constitutional protection, rather than a law designed to prevent or remedy unconstitutional behavior. *City of Boerne v. Flores*, 521 U.S. at 532. "The stringent test RFRA demand[ed] of state laws reflect[ed] a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *City of Boerne v. Flores*, 521 U.S. at 533.

Title VII's prohibition, in contrast, fits comfortably within the wide latitude afforded Congress to remedy and prevent constitutional violations. Title VII requires employers — including the states — not to refuse to hire, fire, or otherwise treat an employee differently in compensation, terms, condition, or privileges of employment because of the employee's religion. 42 U.S.C. § 2000e-2(a). Employers also must take reasonable steps to accommodate employees' religious observances or practices as long as it doesn't cause the employers undue hardship. *Rodriguez v. City of Chicago*, 156 F.3d 771, 775 (7th Cir. 1998).

Unlike the legislation that has run afoul of the Eleventh Amendment, such as the ADEA, Title VII seeks to prevent the infringement — by state employers as well as other employers — of well-established rights under the first Amendment to the United States Constitution. *See McPhaul v. Board of Com'rs of Madison County*, 226 F.3d 558, 566 n.6 (7th Cir. 2000); *Helland v. South Bend Community Sch. Corp.*, 93 F.3d 327, 329-330 (7th Cir. 1996). The State Police has not convinced the court that Title VII's religion provisions so burdens the states as to redefine or expand state employees' constitutional rights. The court does not find that Congress exceeded its authority in enacting 42 U.S.C. § 2000e(j), so the State Police's motion to dismiss on that ground

is denied, and Mr. Endres may proceed on his federal claims of religious discrimination.

The State Police say they are immune from Mr. Endres's breach of contract suit, or alternatively that Mr. Endres has not stated a valid claim for breach of contract. Mr. Endres alleges that the State Police entered into an employment contract with him and gave him an employee handbook, and that these documents created a duty to deal with him fairly and in good faith.

The State Police rely on the Eleventh Amendment's prohibition. *Welch v. Texas Department of Highways*, 483 U.S. 468, 472 (1987). Because the Indiana State Police is an agency of the state of Indiana, a suit against the State Police is constitutionally indistinguishable from a suit against the state of Indiana. *Crenshaw v. Supreme Court of Indiana*, 170 F.3d 725 (7th Cir. 1999); *Ryan v. Illinois Dept. of Children and Family Svcs.*, 185 F.3d 751 (7th Cir. 1999). Mr. Endres agrees that sovereign immunity normally would bar his suit, but says that *Welch* is no bar to his suit because his breach of contract claim is supplemental to his federal claim. Mr. Endres is correct that 28 U.S.C. § 1367 authorizes federal courts to exercise supplemental jurisdiction over state law claims a federal court otherwise would have no statutory power to hear, but the impediment to Mr. Endres's claim is a constitutional bar, not a statutory vacuum. Mr. Endres points to no authority that Congress circumvented the Eleventh Amendment when it enacted 28 U.S.C. § 1367 (which is not borne of § 5 of the Fourteenth Amendment). Mr. Endres seeks to sue a state in federal court, and the Eleventh Amendment says the federal court has no authority to hear that claim. The court dismisses Mr. Endres's breach of contract claim.

The State Police didn't seek to dismiss Mr. Endres' state law civil rights claim, *see* IND. CODE 22-9-1-3, but the Eleventh

Amendment would seem no less a bar to that claim than to the breach of contract claim. Since the issue goes to the court's very power to hear the claim, *see Higgins v. Mississippi*, 217 F.3d 951 (7th Cir. 2000), the court affords Mr. Endres fourteen days from the date of this order to show cause why his state civil rights claim should not be dismissed under the Eleventh Amendment, as well.

For the reasons set forth above, the court GRANTS IN PART AND DENIES IN PART Indiana State Police's motion to dismiss [Docket No. 5]. Count two of the complaint is dismissed and this case shall proceed on count one only. The plaintiff is afforded fourteen days from the date of this order within which to show cause why his claim under IND. CODE 22-9-1-3 should not be dismissed, as well.

SO ORDERED

ENTERED: December 28, 2001

/s/

Robert L. Miller, Jr., Judge
United States District Court

cc: D. Kolbe
S. Wilson
C. Johnson
A. Schuham

D1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

CAUSE NO. 3:01CV0518RM

BENJAMIN P. ENDRES, JR.
Plaintiff

vs.

INDIANA STATE POLICE,
Defendant

Filed July 17, 2001

COMPLAINT

COMES NOW, the Plaintiff, Benjamin P. Endres, Jr., by and through his legal counsel, and for his Complaint against the Defendant states:

1. That Plaintiff, Benjamin P. Endres, Jr. is an individual who resides at 64454 Miami Road, Bremen, Indiana.

2. That Defendant, the Indiana State Police, is an entity created by and operating under the laws of the State of Indiana (I.C. 10-1-1-1).

3. That this action arises under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C.A Section 1983; 42 U.S.C.A Section 2000e) and I.C. 22-9-1-3, as hereinafter more fully appears.

4. That Plaintiff is qualified to file this Complaint having

received a "right to sue letter" dated April 18, 2001, and having filed this action within 90 days of the receipt thereof the same of which is attached hereto as Exhibit "1".

COUNT I
RELIGIOUS DISCRIMINATION

5. That in July 1991, Plaintiff was hired by Defendant, the Indiana State Police and, shortly thereafter, successfully passed the requirements and was certified as an Indiana State Trooper.

6. That the Defendant, at all times relevant herein, was vested by the State of Indiana with authority to establish official policy with respect to certain matters concerning job assignments and to make final decisions in regard to the implementation and execution of such policies, including policies involving job assignments.

7. After Plaintiff became an employee of the Defendant, the Indiana State Police, that the Defendant and the Indiana Gaming Commission entered into an agreement whereby personnel of the Indiana State Police would act as Gaming Commission Agents for the Indiana Gaming Commission.

8. That the Plaintiff is, and was at all times relevant herein, a member in good standing of the Community Baptist Church in South Bend, Indiana, a bonafide religious organization that holds as a tenant of its faith the position that gambling is a vice which is contrary to the principles of the Bible and that its members should not, in any way, participate in and/or facilitate gambling.

9. That in March 2000, the Plaintiff received notification from the Defendant of his assignment as a Gaming Commission Agent to the Blue Chip Casino, in Michigan City, Indiana.

10. That Plaintiff, both prior to receiving the official assignment and after, informed the Defendant of his religious convictions and beliefs that would prevent him from accepting the assignment as a Gaming Commission Agent.

11. That Plaintiff requested from Defendant an alternative assignment than that as a Gaming Commission Agent.

12. That the Defendant failed or refused to attempt to make any reasonable accommodation to Plaintiff's sincerely held religious beliefs.

13. That Plaintiff was charged by Defendant with refusal to comply with a written order and insubordination, and subsequently terminated from his employment.

14. That the above described actions of the Defendant constitute unlawful employment discrimination on account of religion in violation of 42 U.S.A. Section 2000e, 42 U.S.A. Section 1983, and I.C. 22-9-1-3.

15. As a result of the aforesaid termination and the acts of the Defendant, Plaintiff has sustained a deprivation of rights, privileges, and immunities secured by the First, Fifth, and Fourteenth Amendments of the Constitution of the United States, and Article I of the Constitution of the State of Indiana.

16. As a result of the aforesaid termination the Plaintiff has been stigmatized in a manner which will hinder his ability to obtain new employment in either the public or private sector.

17. That as a result of the aforesaid termination and acts of the Defendant, Plaintiff has sustained lost earnings and pay along with other pecuniary losses in the form of lost income, benefits, profits,

and other material damages and said damages and losses are expected to continue into the future.

18. That as result of aforesaid termination and the acts of the Defendant, Plaintiff has sustained nonpecuniary losses including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and such nonpecuniary losses as may be disclosed in discovery.

19. That aforesaid acts were performed by the Defendant with malice and/or with intentional indifference and/or with reckless indifference to the civil rights, state and federal, of the Plaintiff.

COUNT II
BREACH OF CONTRACT

20. That Plaintiff incorporates by reference paragraphs 1-19 herein as if fully set out herein and further alleges:

21. That the Defendant entered into an employment contract with the Plaintiff and gave to the Plaintiff an employee handbook. These documents created an implied in fact and implied in law covenant of good faith and fair dealing.

22. That the Defendant breached these covenants by firing the Plaintiff due to his religious beliefs and by failing to accommodate those beliefs, and by breaching the contract denied the Plaintiff of his rights under the contract to wages and benefits.

WHEREFORE, the Plaintiff respectfully requests judgment against the Defendant for compensatory damages in the amount of $250,000.00 including back pay, reinstatement of employment, front pay if reinstatement is not made, punitive damages, attorney fees, expert fees, pre-judgment interest, interest, costs and other

such relief as will redress the actions of the Defendant and as the Court deems just.

JURY DEMAND

The Plaintiff herewith demands a jury trial as to all issues triable by jury.

Respectfully submitted,

/s/

David C. Kolbe
Attorney for Plaintiff
302 West Center Street
Warsaw, IN 46580
Atty No. 5459-43
(219)267-5353 Telephone
(219)268-9293 Telefax

E1

U.S. Department of Justice

Civil Rights Division

Employment Litigation Section
P.O. Box 65968
Washington, mDC 20035-5968
www.usdoj.gov/crt/emp/emphome.html

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

April 18, 2001

WRY: WBF:mdw
DJ 170-265-99

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Benjamin P. E. Endres, Jr.
64454 Miami Road
Bremen, Indiana 46506

Re: Benjamin P. E. Endres, Jr. v. Indiana
State Police, EEOC No. 240-AO-1254

Dear Mr. Endres:

The Civil Rights Division has completely reviewed the file referred to us by the Equal Employment Opportunity Commission (EEOC) in its investigation of your charge of discrimination, and it

has been determined that we will not file suit in this particular matter against the respondent. This should not be taken to mean that the Department of Justice has made a judgment as to whether or not your charge is meritorious.

You are hereby notified that conciliation in this matter was unsuccessful by the EEOC. You are further notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent. If you choose to commence a civil action, such suit must be filed in the appropriate court within 90 days of your receipt of this Notice.

Therefore you should consult an attorney of your own choosing at your earliest convenience. If you are unable to locate an attorney, you may wish to contact the EEOC, or apply to the appropriate court, since that court may appoint an attorney in appropriate circumstances under Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1).

We are returning the file in this matter to EEOC's Indianapolis District Office. If you or your attorney have any questions concerning this matter or wish to inspect the investigative file, please feel free to address your inquiry to: Danny G. Harter, District Director, EEOC, 101 W. Ohio Street, Suite 1900, Indianapolis, IN 46204-4203.

Sincerely,

William R. Yeomans
Acting Assistant Attorney General
Civil Rights Division

/s/
By: William B. Fenton
Deputy Chief
Employment Litigation Section

cc: David Kolbe, Esq.
Attorney for Charging Party

Anthony Sommer, Esq.
Attorney for State of Indiana

F1

U.S. Equal Employment Opportunity Commission
Indianapolis District Office

101 West Ohio Street, Suite 1900
Indianapolis, IN 46204-4203
(317) 226-7212
TTY (317) 226-5162
FAX (317) 226-7953

June 7, 2000

Mr. Benjamin P. Endres, Jr. Charge Number 240A01265
64454 Miami Road
Bremen, Indiana 46506 Charging Party

Indiana State Police
Indiana Government Center North
100 North Senate Avenue
Indianapolis, Indiana 46204-2259 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

The charge alleges that the Respondent discriminated against the Charging Party in violation of Title VII of the 1964 Civil Rights Act, as amended, in that Respondent failed to provide Charging Party a reasonable accommodation for his religious beliefs, and discharged him, because of his religion.

The evidence supports the Charging Party's allegation that Respondent failed to reasonably accommodate Charging Party's religious beliefs. Evidence does not support Respondent's contention that to accommodate Charging Party would result in an undue hardship. The evidence also supports Charging party's allegation that he was discharged because of his religion. Based on this, I have determined that there is reasonable cause to believe that Respondent violated Title VII of the 1964 Civil Rights Act, as amended.

Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the near future to begin the conciliation process. Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with Section 706(b) of Title VII and Section 1601.26 of the Commission's Procedural Regulations. Where the Respondent declines to enter into settlement discussions, or when the Commission's representative for any other reason is unable to secure a settlement acceptable to the office Director, the Director shall so inform the parties in writing and advise them of the court enforcement alternative available to the Charging Party and the Commission.

On Behalf of the Commission:

June 7, 2000
Date

/s/
Danny G. Harter,
District Director

cc: Lieutenant Michael F. Reedus
EEO Officer, Indiana State Police
Indiana Government Center North
100 North Senate Avenue
Indianapolis, Indiana 46204-2259

(2)

Supreme Court, U.S.
FILED
MAR 19 2004
OFFICE OF THE CLERK

No. 03-1183

IN THE

Supreme Court of the United States

BENJAMIN ENDRES,

Petitioner,

v.

INDIANA STATE POLICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6201

*Counsel of Record

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Special Counsel
RAEANNA S. MOORE
Deputy Attorney General

Counsel for Respondent

QUESTION PRESENTED

Petitioner, former Indiana State Police Trooper Benjamin Endres, was assigned duty aboard a casino boat. When he received that assignment, Endres demanded a different assignment based on his religious objections to gambling. The State Police refused this post-assignment, task-specific accommodation. When Endres refused to report for casino boat duty, the State Police terminated his employment for insubordination.

The question presented is whether, under these circumstances, it was reasonable under Title VII for Endres to demand a task-specific accommodation from having to protect activities and enforce laws that he finds religiously objectionable.

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STATEMENT

This case is not worthy of Supreme Court review for all of the classic reasons: there is no conflict in the circuits with respect to the question presented; petitioner presents no argument that the issue is otherwise nationally significant; the Seventh Circuit decided the issue correctly; and the case presents an extraordinarily poor vehicle for resolving the question presented. On this latter point, in particular, not only does a lurking Eleventh Amendment jurisdictional issue obstruct the question presented, but before he filed his federal court claim, petitioner began pursuing a state tribunal reinstatement claim that has been unsuccessful in part because he failed to take advantage of reasonable accommodations that were available.

1. In 1993, the Indiana General Assembly created the Indiana Gaming Commission for the purposes of issuing riverboat casino licenses to private entrepreneurs and regulating those casinos. Ind. Code § 4-33 *et seq.* Because of the obvious need for police protection for these high-cash businesses and their patrons, the Indiana State Police entered into an agreement with the Gaming Commission concerning the means by which it would provide police protection at riverboat casinos. Pet. 3; Pet. App. C1-2, D2. The agreement provided that State Police Troopers would be cross-assigned the duties of Gaming Commission Agents, meaning that they would be required, for example, to certify gambling revenue, investigate complaints from the public about the gambling system, and conduct licensing investigations for the casinos and their employees. Pet. 3; Pet. App. A3.

2. According to his July 17, 2001, federal district court damages complaint (which alleged breach of contract and a violation of 42 U.S.C. § 1983 in addition to a Title VII religious accommodation claim, Pet. App. D1-4), Endres was assigned the duties of a Gaming Commission Agent in March 2000. Pet. App. D2. When Endres refused to report for this duty, the State Police fired him for insubordination. Pet. 4; Pet. App. D3. Endres claims that the State Police improperly failed to accommodate his religious beliefs when it refused to give him another assignment. Pet. 4; Pet. App. A3, B3, C2, D3.

The State Police responded to Endres' federal court lawsuit with a motion to dismiss the Title VII and breach of contract claims for lack of jurisdiction, arguing that Congress's attempt to abrogate states' Eleventh Amendment immunity for Title VII religious accommodation claims was invalid because it exceeded Congress's powers under Section 5 of the Fourteenth Amendment. Pet. 4-5; Pet. App. C2-3. The United States intervened solely to defend the constitutionality of the attempted abrogation. Pet. 5; Pet. App. A2-3, B2, C2-3. The district court denied the State Police's motion to dismiss the Title VII claim on Eleventh Amendment grounds, though it did dismiss the breach of contract claim. Pet. 5; Pet. App. C6-7.

The State Police then pursued an interlocutory appeal to challenge the district court's ruling on the Eleventh Amendment issue. Pet. 5; Pet. App. A3, B2. The Seventh Circuit determined that its duty to avoid constitutional issues where possible made it "prudent" to inquire whether the State Police had a duty to accommodate petitioner under Title VII before reaching the claim of Eleventh Amendment immunity. Pet. App. A4, B3-4. It then held that "Endres has made a demand that it would be unreasonable to require any police or fire department to tolerate" and remanded the case to the district court with instructions to enter judgment for

the State Police on the merits.[1] Pet. App. A7-8, B7, B17. The Seventh Circuit denied en banc review on November 19, 2003. Pet. App. A1. The district court formally dismissed the case on January 5, 2004. Respondent's Appendix (hereinafter "R. App.") 38a.

3. As mentioned above, but as petitioner fails even to acknowledge, before filing this Title VII case for damages in federal court, petitioner filed a reinstatement (and back pay) claim through a state administrative and judicial review grievance procedure that rests in part on the same asserted Title VII violation that he claims here. That state tribunal case has resulted in a published decision relating the circumstances surrounding petitioner's termination. *See Endres v. Indiana State Police*, 794 N.E.2d 1089 (Ind. Ct. App. 2003) (petition for transfer pending) (reprinted at R. App. 1a). This case is unworthy of review even apart from the facts developed in petitioner's unsuccessful state court proceedings, but those facts, set forth below, demonstrate that petitioner would have no viable Title VII claim even if the Seventh Circuit were reversed.

4. On October 12, 1999, petitioner's State Police Post conducted a lottery to determine who would serve as Gaming Commission Agents. R. App. 3a. Petitioner was the first to be chosen, though his formal assignment was not made at that time. *Id.* He immediately told his supervisor that his

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[1] The Seventh Circuit also ordered dismissal of petitioner's Section 1983 claim on the combined grounds that the State Police was not a proper defendant under Section 1983 and that, in light of *Employment Div. v. Smith*, 494 U.S. 872 (1990), Endres had no prospect for success under Section 1983 in any event (and therefore should not be allowed to amend his complaint to name individuals as defendants). Pet. App. A9. The petition does not seek review of these determinations.

religious beliefs would not allow him to serve as a Gaming Commission Agent. *Id.* Petitioner's supervisor told him that he was not likely to have to serve because the Department expected to get a sufficient number of volunteers to fill the positions. *Id.*

The State Police's lottery system provided that a Trooper could avoid serving as a Gaming Commission Agent by requesting a transfer or a promotion for which he is qualified prior to the actual Gaming Commission Agent assignment being made. *Id.* A Trooper could also avoid such an assignment by soliciting a volunteer to take his place. *Id.* The day after conducting its lottery, petitioner's Post opened transfer requests for non-Gaming Commission Agent positions that stayed open for multiple weeks. *Id.* In addition, petitioner had passed the required tests for a promotion to the higher rank of Corporal, and the State Police had opened two Corporal positions. *Id.* State Police employees with the rank above Trooper did not have to serve as Gaming Commission Agents. *Id.* Petitioner neither requested a transfer nor applied for a position as Corporal. *Id.*

On March 2, 2000, some four-and-a-half months after learning that he had been chosen by lot to serve as a Gaming Commission Agent, petitioner received his actual assignment to the Blue Chip Casino beginning April 3, 2000. R. App. 4a; *see also* Pet. App. A3, B3, C2, D2. Petitioner quickly requested a meeting with the State Police Superintendent; he received one on March 13, 2000. R. App. 4a. During that meeting, petitioner explained that his religious beliefs would not allow him to be a Gaming Commission Agent in any form, not even by working on the docks or other locations near the boat such as hotel lobbies, lounges or parking lots. *Id.* He then requested another assignment. *Id.; see also* Pet. App. A3, B3, C2, D3. The Superintendent told petitioner that there were no exceptions to taking an assignment once it had been made. R. App. 4a. The Superintendent followed up

with a letter to petitioner making it clear that failure to report for the assignment would be an act of insubordination subject to investigation and possible disciplinary action. R. App. 4a-5a. When petitioner refused to report for duty at the Blue Chip Casino on April 3, 2000, the State Police began an internal investigation that resulted in his termination. R. App. 5a-6a; *see also* Pet. 4; Pet. App. A3, B3, C2, D3.

Petitioner filed a grievance with the Indiana State Police Board, but the Board, which held a hearing on August 21, 2000 (R. App. 27a), denied his claim on April 9, 2001, rejecting Endres' Title VII claim. R. App. 6a, 32a-33a. On May 8, 2001, Petitioner filed for judicial review of the Board's decision in Marshall Superior Court. R. App. 6a. On June 27, 2002, that court, finding the facts elucidated above (most of which had previously been found by the Board), denied the petition and held that Endres' termination did not violate Title VII, the First Amendment, or the Indiana Constitution. R. App. 6a, 19a-23a. Petitioner ultimately appealed that decision, and on August 27, 2003, the Indiana Court of Appeals affirmed, concluding that the Seventh Circuit's ruling on petitioner's Title VII claim collaterally estopped his pursuit of the same theory in state court. R. App. 9a. The Indiana Court of Appeals also ruled that petitioner's First Amendment and Indiana Constitution claims were without merit. R. App. 15a. Endres has petitioned the Indiana Supreme Court for discretionary review of his state court case.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS FROM OTHER CIRCUITS

In an effort to make this case look significant, petitioner asserts (albeit not until two-thirds of the way through the petition) that the decision below conflicts with decisions from the Fourth, Ninth, Tenth and Eleventh Circuits. However, none of the cases he cites represents any kind of conflict with the decision below.

1. Petitioner first cites *Balint v. Carson City*, 180 F.3d 1047 (9th Cir. 1999), as being in conflict, but there the only issue was whether a seniority system insulated a police department from an officer's Sabbath request. There was no "task-specific request for religious accommodation" (Pet. i.) at stake.

In *Balint*, furthermore, the department's argument was *not* that the officer's Sabbath request was unreasonable on its face, but that 42 U.S.C. § 2000e-2(h) (which permits the operation of bona fide seniority systems under Title VII) allowed the department to meet religiously based scheduling requests solely through its seniority system. *Balint*, 180 F.3d at 1051. The Ninth Circuit merely ruled that, while Section 2000e-2(h) protects seniority systems from being the basis for Title VII liability—and while *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), says that it would be undue hardship to force an accommodation that breaches a collectively bargained seniority system—seniority systems themselves do not inoculate employers from having to accommodate religiously based scheduling demands. *Balint*, 180 F.3d at 1051-53. The court additionally ruled that there was not yet any basis for inferring that a "shift-splitting"

accommodation would create an undue hardship by disrupting the department's seniority system. *Id.* at 1055-56.

Nothing in the *Balint* holding or reasoning conflicts with the decision below. The demand for accommodation had only to do with *when* the officer would work and had nothing to do with *what* laws the officer would enforce or what activities she would protect. There is simply no way to compare the reasonableness of the requests. Petitioner's demand not to perform certain lawful duties on a casino boat because of religious objections applies every day and is therefore more intrusive upon and has far greater potential to undermine the integrity of the Indiana State Police as an impartial law enforcement agency. *Balint* would not preclude outright dismissal of the same claim in the Ninth Circuit.[2]

2. Oddly, petitioner's second case that supposedly conflicts with the decision below actually *upheld* a police department's refusal to provide an officer with a Sabbath accommodation owing to the nature of police work. In *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995), the court affirmed a magistrate judge's conclusion that "requiring the Department to grant shift exceptions . . . would result in a greater than *de minimis* cost in light of the public health, safety and welfare considerations associated with police work." *Id.* at 636. Thus, far from conflicting with the Seventh Circuit's decision in this case, *Beadle* actually lays the groundwork for it. If an officer's demand for a

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[2] Petitioner also briefly cites, without discussion, *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986). But that case involved the Postal Service, not a "paramilitary" or public safety employer, so there is no comparing the reasonableness of the demand for accommodation. Furthermore, the defendant apparently argued only that the accommodation provided was sufficient, not that the demand itself was unreasonable. *Id.*

scheduling accommodation need not be satisfied given the nature of police work, then surely the same would be true of a demand to be accommodated from enforcing certain laws and protecting certain activities.

Endres seizes on boilerplate language in *Beadle* to the effect that Title VII cases are fact-dependent. But while factual development may matter at some level of generality (*e.g.*, police department cases are factually distinguishable from, say, private employer cases), *Beadle* does not suggest that *all* demands for religious accommodation must be deemed *prima facie* reasonable. In light of *Beadle*, later cases in the Eleventh Circuit brought by police officers seeking Sabbath accommodations might reasonably be dismissed because, owing to the nature of police work, such demands will *always* impose greater than *de minimis* costs. The Seventh Circuit discussed this same concept in terms of the unreasonableness of the request rather than undue hardship, but under either vocabulary a police department need not be put to proof of undue hardship when the demand for accommodation is self-evidently untenable.

3. Petitioner again relies on a boilerplate recitation of the importance of fact sensitivity under Title VII in citing *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977). Like *Beadle*, however, *Albuquerque* upheld a city's refusal to accommodate a public safety employee's (a firefighter's) Sabbath request. *Id.* at 111-12. It is therefore especially fitting that *Albuquerque* was cited in *Beadle* to establish the notion that courts should consider the special duties of public safety employers when applying Title VII: "When the employer's business involves the protection of lives and property, 'courts should go slow in restructuring [its] employment practices.'" *Beadle*, 42 F.3d at 637 (quoting *Albuquerque*, 545 F.2d at 114). And while *Albuquerque* cited the City's shift-trading and liberal leave policies in concluding that the

City had done enough (545 F.2d at 113-14), there is no way to infer from this decision that the Tenth Circuit would require a police department to provide some accommodation for an officer who wished to avoid enforcing certain laws or protecting certain activities. Quite the contrary: The Tenth Circuit has properly shown the same solicitude toward public safety employers as the Seventh Circuit. These decisions are therefore consistent in both their approaches and outcomes.

4. Finally, petitioner cites the Fourth Circuit's unpublished decision in *Miller v. Drennon*, No. 91-2166, 1992 WL 137578 (4th Cir. June 19, 1992), which, like *Beadle* and *Albuquerque*, upheld a public safety employer's refusal to accommodate an employee's religious demand, in that case as it related to working conditions, but not tasks. Once again, petitioner's only basis for asserting a conflict with this case is *Drennon*'s recitation of the standard language concerning the fact-dependent nature of Title VII cases. But the Seventh Circuit's decision does not reject this notion of Title VII doctrine; it merely concludes that, so far as cases against police and other "paramilitary" or public safety employers are concerned, a demand to be exempted from performing specific tasks based on one's religion is unreasonable. Nothing in *Drennon* stands to the contrary.

* * * *

Petitioner describes his demand as a "task-specific request for religious accommodation." Pet. i. Yet there was no such request in any of his four main "circuit-split" cases. *Balint, Beadle* and *Albuquerque* all are Sabbath cases, and *Drennon* had to do with religiously offensive working conditions, not specific tasks. Furthermore, three of the four cases were resolved in favor of the government employers, and two expressly agreed that public safety employers face distinctive problems when it comes to demands for accommodation. Accordingly, there is nothing to the suggestion that the decision below conflicts with these cases.

II. THE SEVENTH CIRCUIT PROPERLY HELD THAT PETITIONER'S DEMAND WAS UNREASONABLE, AND THE ISSUE IS NOT OF PRESSING NATIONAL CONCERN

The Seventh Circuit's decision that petitioner's demand not to work as a Gaming Commission Agent was unreasonable under Title VII fits comfortably within Title VII's text. Furthermore, it is based on sound policy that ultimately protects more religious freedom than the alternative, and petitioner has made no attempt to show that this issue arises frequently or is at the center of an important national debate.

1. To begin, it is important to bear in mind what the Seventh Circuit did not do. Petitioner repeatedly asserts or insinuates that the decision below created an "exemption" for paramilitary employers from Title VII's religious accommodation requirement. Pet. 7, 8, 9, 10, 11, 12, 13, 15, 18, 19. This assertion is wrong for at least two reasons.

First, the court nowhere construed Title VII to "exempt" the State Police (or other public safety or "paramilitary" employers), nor did it ever state that such employers are somehow "exempt" from anything. Rather, the court merely evaluated the nature of the State Police as an employer and concluded that it is not reasonable (as Title VII requires) for a Trooper to demand a task-specific religious accommodation. This no more "exempts" the State Police from Title VII than *Albuquerque* "exempts" fire departments that permit shift trading and liberal leave. 545 F.2d at 113. Both have only to do with what is reasonable.

Petitioner's argument also ignores the fact that similar issues have already percolated through the Seventh Circuit in two other cases, giving that court a breadth of experience concerning the unreasonableness of making a task-specific demand of a police agency, as distinct from the applicability

of Section 701(j) as an initial matter. *See Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998) (police department not required to honor demand not to guard an abortion clinic where there was opportunity for transfer); *Ryan v. United States Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991) (FBI not required to permit an agent to choose assignments based on religious beliefs). Petitioner's lengthy demonstration of how to discern whether Congress intended to exempt law enforcement agencies from civil rights laws has no connection with the Seventh Circuit's actual rationale and holding.

Second, while petitioner suggests that this case renders unreasonable *all* accommodation demands made of "paramilitary" employers, the decision below holds only that "task-specific" demands for accommodation are unreasonable when made of the State Police. Pet. 19. It does not hold, for example, that a police officer's request for a Sabbath accommodation or a working conditions accommodation would necessarily be unreasonable. *But see Beadle,* 42 F.3d at 636-38 (holding that, regardless of what accommodations were made available, a police officer's Sabbath request would impose an undue hardship on his employer given the department's public safety mission). Petitioner has therefore overdramatized what is at stake.

2. The Seventh Circuit properly applied Title VII to the issue that it actually did address. The starting point is Section 701(j)'s text, which provides that employers must "reasonably accommodate" employees' religious beliefs and practices. 42 U.S.C. § 2000e(j). The statute *separately* provides that an accommodation need not be provided if it would impose an "undue hardship" on the employer. *Id.* As the Seventh Circuit has suggested, there may be some overlap between the two concepts concerning the cost (in dollars or otherwise) of the benefit, but with respect to "reasonableness" the inquiry has to do with the proportionality between the cost and the benefit rather than the impact

of the cost on the employer. *Cf. Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995) (distinguishing between "reasonable accommodation" and "undue hardship" in the context of the ADA) (cited at Pet. App. A5, B5).

Thus, if it is apparent that a demand for accommodation is unreasonable, *i.e.* out of proportion to its economic or social cost, there is no point in proceeding to the "undue hardship" inquiry. Section 701(j)'s text plainly permits an up-front analysis of whether the demand for accommodation is reasonable, and there is no basis for concluding that it requires an employer to prove undue hardship to rebut a self-evidently excessive demand for accommodation. The Seventh Circuit merely applied this commonsense (and text-based) understanding of Title VII when it deemed unreasonable petitioner's demand not to be assigned the duties of a Gaming Commission Agent.

Furthermore, petitioner has remarkably little to say in support of the reasonableness of his demand. He notes that the Seventh Circuit ruled as it did in part because "law enforcement agencies need the cooperation of all members" (Pet. 13-14, citing Pet. App. A8) and worries that this rationale might be extended to other employers, but he does not refute the rationale itself. In fact, in the midst of comparing his own situation to that of oath-bound health care workers, petitioner concedes that "[o]ne would hope that doctors, surgeons, nurses and other members of the health care professions . . . would not refuse to treat a patient because they disagreed with the patient's religious beliefs." Pet. 14-15. Indeed. But regardless whether the Seventh Circuit's rationale here would prevail in such contexts, petitioner himself sees the problem that makes his demand so unreasonable: there are just some employers, particularly those charged with public safety, whose circumstances make task-specific religious accommodations unreasonable.

To be sure, there is far more to the Seventh Circuit's reasoning than just the State Police's obvious need for employee cooperation. Underlying this need is the special obligation of "agencies such as police and fire departments designed to protect the public from danger" to remain neutral with respect to religious and other views in fulfilling their missions. Pet. App. A7-8, B6-7. It only makes sense that, to accomplish this duty, such agencies "may insist that *all* of their personnel protect *all* members of the public—that they leave their religious (and other) views behind so that they may serve all without favor on religious grounds." Pet. App. A7, B6. A rule that undermines rather than protects this understanding may lead to a "loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect." *Rodriguez*, 156 F.3d at 779 (Posner, C.J., concurring).

Petitioner says that an accommodation for him would not be playing favorites because he would be willing to "enforc[e] general vice laws at the casinos" (Pet. 14) even though he refuses to execute the duties of a Gaming Commission Agent. The state court record tends to refute this. R. App. 4a (finding that Endres refused even to work as a Gaming Commission Agent in nearby non-casino hotels and parking lots). But more fundamentally, petitioner does not explain why his willingness to enforce some laws but not others at the casino places the State Police in any less difficulty than if he refused to enforce *all* laws at the casino. Similarly, petitioner rejects a comparison between his situation and that of an officer who has religious objections to protecting prostitutes (calling the latter a "strawman" hypothetical, Pet. 6-7), but he offers no principled distinction. The point remains: It is unreasonable for a police officer to request accommodation from enforcing laws or protecting activities he finds religiously objectionable. This is a sound rule that fits easily within Title VII's text and meaning.

Petitioner protests that the decision below will lead to "dire consequences for religious freedom in the Seventh Circuit" (Pet. 13), but he cites no cases or other evidence to support this view. As a matter of logic, the Seventh Circuit's rule is actually more likely to protect religious liberty and pluralism than acceding to petitioner's demand would protect. If officers could pick and choose assignments depending on religious beliefs, those who engage in conduct that mainstream religions condemn may find themselves unprotected. Pet. App. A8, B7. Such a circumstance could chill the very right to individual belief and practice that petitioner seeks to vindicate. Perhaps this is why petitioner has been unable to establish that the permissibility of police officers' task-specific religious accommodation demands has become a serious national issue. And in the unlikely event that experience under the Seventh Circuit's rule bears out petitioner's concerns, the Court could consider the issue at that point. But there is no reason to do so now.

III. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT AN EXTRAORDINARILY POOR VEHICLE FOR CONSIDERING THE QUESTION PRESENTED

This case is an extraordinarily poor vehicle for addressing the sole question presented by the petition in view of the lurking question of whether Congress validly abrogated states' sovereign immunity with respect to religious accommodation claims—a question acknowledged, but avoided, by the Seventh Circuit below—and in view of the results of petitioner's two-track litigation strategy.

1. The Indiana State Police unsuccessfully moved to dismiss this case in the district court on the grounds that Title VII Section 701(a)'s abrogation of Eleventh Amendment immunity was invalid with respect to Title VII Section 701(j)

religious accommodation claims. On appeal, however, the Court of Appeals thought it "ma[de] sense" to decide whether Section 701(j) requires accommodation "[b]efore taking up the question whether § 701(j) is an exercise of § 5 powers." Pet. App. A4, B3-4.

Petitioner seeks review of asserted legal error in the determination that his demand for accommodation was unreasonable under Section 701(j), but he also acknowledges that the Eleventh Amendment abrogation issue remains unresolved. Pet. 20-23. What petitioner fails to consider, however, is that in *all* cases this Court must first be assured of its own jurisdiction. Here, this means that, in order to reach the issue presented in the petition, the Court must decide: (1) whether the Seventh Circuit properly concluded that the Eleventh Amendment issue did not go to jurisdiction (Pet. App. A4, B3-4); and (2) if the Eleventh Amendment issue is jurisdictional, whether Congress validly abrogated sovereign immunity with respect to religious accommodation claims. Petitioner, however, has not presented a question that encompasses these "analytically and factually" distinct jurisdictional issues. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32, 34 (1993) (per curiam); *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992); Sup. Ct. Rule 14.1(a).

Furthermore, even if this Court were to rule that the Eleventh Amendment issue is not jurisdictional and that petitioner has stated a Title VII claim, petitioner would still face a significant hurdle to presenting that claim on the merits. Either this Court or the Seventh Circuit would need to decide whether Congress properly abrogated Eleventh Amendment immunity for religious accommodation claims. So, a simple holding from this Court that petitioner has stated a claim would not directly set this case in motion on the merits.

In fact, if this Court were to grant review, the State Police would then urge as an independent ground for affirming the judgment of the Court of Appeals that the Eleventh Amendment bars petitioner's suit from going forward in federal court. More particularly, Congress's purported abrogation of Eleventh Amendment immunity for Section 701(j) religious accommodation claims is invalid. Requiring religious accommodation, as distinct from prohibiting religious discrimination, is incongruent and disproportionate to the authority granted to Congress under Section 5 of the Fourteenth Amendment, and is unsupported by any historical record showing the need for religious accommodation rights as against state government employers. *See City of Boerne v. Flores*, 521 U.S. 507 (1997); *see also Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

2. Finally, petitioner's litigation against the State Police has proceeded on two separate tracks: a federal court claim seeking damages, reinstatement, and back pay, and a state tribunal claim seeking reinstatement and back pay. The State Police Board and the Marshall Superior Court rejected petitioner's Title VII claim on the merits, ruling that he failed to take advantage of reasonable accommodations available to him before he received his formal assignment. R. App. 21a-22a, 30a, 32a. Specifically, following the lottery, but before his formal assignment to the casino boat, petitioner could have requested a transfer to available non-casino positions; he could have sought a promotion to Corporal (which would have excluded casino duty); or he could have sought a volunteer to take his place. R. App. 3a, 15a, 21a-22a, 30a, 32a. These state tribunal factual findings may estop any contrary federal court findings, and they at least presage a federal court finding that the State Police provided Endres a reasonable accommodation under Section

701(j) before his formal assignment and did not need to offer him special treatment after he received his assignment.[3]

The parallel state court litigation, furthermore, is surely a procedural oddity that complicates this case and further undermines its utility as a vehicle for addressing the question presented. To be sure, the precise significance of the state court findings for any future federal court proceedings may not be absolutely clear (and a reversal here would undermine the collateral estoppel applied by the Indiana courts). But what is clear is that ultimately, even if petitioner convinces the Court that he has stated a cognizable Title VII claim, and even if the Eleventh Amendment issue is resolved in his favor, the facts that have come to light in petitioner's state court proceeding show that there is grave doubt that he can ultimately prevail on the merits of this lawsuit. So, again, petitioner would actually gain very little, if anything, from a grant of his petition.

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[3] The Indiana Court of Appeals, to be sure, ruled that the Seventh Circuit's holding estopped petitioner's Title VII theory for reinstatement and back pay in state court, so it did not reach the merits of the Title VII issue. However, that court then rejected *on the merits* petitioner's claim under the Indiana Constitution "[b]ecause alternatives that did not burden [petitioner's] religious freedoms" were available that petitioner did not pursue. R. App. 15a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 19, 2004

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APPENDIX A

FILED – August 27, 2003
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Clerk of the Indiana Supreme Court
Court of Appeals and Tax Court

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IN THE
COURT OF APPEALS OF INDIANA

BEN ENDRES, Appellant,	)	
vs.	)	No. 50A05-0210-CV-477
INDIANA STATE POLICE, Appellee.	)	

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0105-MI-9

August 27, 2003

OPINION – FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Ben Endres appeals an adverse judgment by the trial court that upheld the decision of the Indiana State Police Board terminating Endres' employment as an Indiana State Trooper after Endres failed to report to duty as a gaming agent.

We affirm.

ISSUES

1. Whether, pursuant to Title VII of the Civil Rights Act of 1964, Endres was discriminated against because of his religious belief.

2. Whether Endres' state and federal constitutional rights of free exercise of religion were violated when his employment as an Indiana State Trooper was terminated for failure to report to duty as a gaming agent.

FACTS[1]

Endres was hired as an Indiana State Trooper in 1991. After Endres was hired, Indiana legalized gambling, including riverboat casinos. Thereafter, the Indiana State Police (the "Department") entered into an interagency

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[1] We note that a substantial portion of Endres' Appendix is utterly useless. The Appendix contains excerpts of what appears to be testimony and legal argument without any references identifying the proceedings, the forum, the context, or the speaker. The Table of Contents to the Appendix does not clarify the matters. We were able to complete our review because the State provided the transcripts in its Appendix. Accordingly, we direct counsel to Indiana Appellate Rule 50(A)(1) regarding Appendices in civil cases: "The purpose of an Appendix . . . is to present the Court with copies of only those parts of the record on appeal that are necessary for the Court to decide the issues presented."

agreement with the Indiana Gaming Commission whereby the State Police would provide Troopers as gaming agents at riverboat casinos to provide protection, to ensure public safety, and to enforce gaming laws.

In 1997, the Department developed a lottery system for assigning Troopers to riverboat casinos as gaming agents. As part of the system, a Trooper in the lottery could avoid an assignment to a riverboat casino by requesting a transfer or a promotion for which he/she is qualified before the actual gaming agent assignment is made. Also, a Trooper could solicit a volunteer to serve in his/her stead.

In September 1999, the Bremen Post where Endres was stationed was included in the lottery for the assignment of gaming agents. On October 12, 1999, the Bremen Post lottery was conducted and Endres was chosen first for assignment as a gaming agent. That day, he expressed to his immediate supervisor, Lt. Malayter-Brubaker, that his religious beliefs would foreclose his serving as a gaming agent on a riverboat casino. Lt. Malayter-Brubaker told Endres that, in all likelihood, he would not be assigned as a gaming agent because the Department anticipated that a sufficient number of volunteers would apply for the gaming agent positions.

On October 13, 1999, the day after the Bremen Post lottery was conducted, transfer requests for five assignments other than gaming agents were opened and remained open for approximately one month. Endres did not seek a transfer. Also, because Endres had taken and passed the requisite tests, he was qualified to request a promotion to the rank of corporal. Two corporal positions were available at the Bremen Post at the time, and State Police officials with a rank above Trooper did not have to serve as gaming agents. Endres did not apply for either position.

On March 2, 2000, Endres was assigned to the Blue Chip Casino and he was to report for duty on April 3, 2000. He learned of the assignment on March 2, 2000, and he then requested a meeting with Superintendent Carraway. He met with the Superintendent on March 13, 2000. Endres informed the Superintendent that his religious convictions would conflict with his assignment as a gaming agent. The Superintendent asked Endres whether he could work on the dock or other locations near the gaming boat, e.g., hotel lobbies, lounges, or parking lots. Endres responded that he could not become a gaming agent in any form, even a modified version. He then requested a transfer. The Superintendent explained that once an actual assignment is made, there could be no exceptions to that assignment.

On March 23, 2000, the Superintendent sent a letter to Endres stating:

> I enjoyed meeting with you and discussing your views on the gaming boats. I truly understand your convictions and believe that you have a very deep faith. Our job as law enforcement officers requires that we serve all the people of the State, not just those with whom we feel comfortable. No matter how offensive a person, situation or location may be to us, we have taken an oath to serve, protect, and uphold the laws of the State of Indiana.
>
> You asked if an exception could be made in your case. The answer remains no. I hope you understand the ramifications of your question and the [un]tenable position in which it places me and the agency. I've received

> several calls from chaplains on your behalf, and have explained to them as well that there can be no exceptions.
>
> Ben, I have heard a disturbing rumor about you not reporting to the gaming boat assignment as required. If this is true, I must inform you that your action would be insubordinate, and would set into place an internal investigation and possible disciplinary action. I hope that is not your intent. I believe you can meet your obligations to the State and the Indiana State Police and still maintain the integrity of your convictions.

(State's App. 290). Lt. Scott Schuh, the Acting Commander of the Bremen Post, received a copy of the letter on March 29, 2000. Lt. Schuh told Endres to report to the boat for his assignment as ordered. Endres informed Lt. Schuh that he would not follow the order.

On April 3, 2000, Endres failed to report for his assignment as a gaming agent. The Superintendent contacted Lt. Schuh on that day and was informed that Endres failed to report as ordered, but had commenced working at his former duties. The Superintendent directed Lt. Schuh to personally instruct Endres to report to the riverboat for his assignment. Lt. Schuh radioed Endres with the instructions. Endres responded "that he could not do it due to his religious convictions." (State's App. 112). After reiterating to Endres that his stance would result in an internal investigation and the possibility of discipline, Lt. Schuh took the steps required to commence the investigation. Lt. Schuh allowed Endres to continue working while the internal investigation was completed.

As a result of the internal investigation, Superintendent Carraway terminated Endres' employment with the Department for insubordination. After an appeal hearing, on April 9, 2001, the Indiana State Police Board ("Board") upheld the Superintendent's decision terminating Endres. On May 8, 2001, Endres petitioned for judicial review. On February 11, 2002, the trial court held a hearing wherein the parties presented arguments, and the evidence taken at the Board hearing was submitted. On June 27, 2002, the trial court entered its order detailing the evidence, determining that the Board's decision "is supported by substantial evidence and also supported by the law," and concluding that Endres failed to meet his burden to demonstrate that the Board's decision was invalid. (Appellant's App. 58). The court entered judgment for the State. On July 29, 2002, Endres filed a motion to correct error. On August 12, 2002, the court denied Endres' motion to correct error.

Subsequently, after the briefing period in the present case, the Seventh Circuit Court of Appeals entered its decision in Endres' separate federal action. See Endres v. Indiana State Police, No. 02-1247, 2003 WL 21480361 (7th Cir. June 27, 2003) (consolidated with Holmes v. Marion County Office of Family and Children, No. 02-1377, 2003 WL 21480361 (7th Cir. June 27, 2003)). The Seventh Circuit analyzed Endres' Title VII claim and determined that Endres failed to state a claim upon which relief could be granted.

DECISION

Standard of Review

Courts have the power to review actions of state agencies taken pursuant to the Administrative Orders and Procedures Act ("AOPA"); however, the power of judicial review is limited. LTV Steel Co. v. Griffin, 730 N.E.2d 1251, 1257 (Ind. 2000). Courts may set aside only those agency decision that are:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) contrary to constitutional right, power, privilege, or immunity;
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (4) without observance or procedure required by law; or
> (5) unsupported by substantial evidence.

Id. (quoting Ind. Code § 4-21.5-5-14(d)). Agency decisions as to findings of fact are accorded deference; however, no such deference is accorded to the agency's conclusions of law. Id.

1. Title VII

As noted in FACTS, the Seventh Circuit Court of Appeals rendered a decision in the federal action commenced by Endres. See Endres, 2003 WL 21480361. The federal court outlined the appropriate analysis under Title VII, 42 U.S.C. § 2000e(j). Id. In general terms, an employer or prospective employer is required to make

reasonable accommodations for employees' religious observances and practices, unless such would cause undue hardship for the employer. Id. The court observed that the "reasonableness" component is distinct from the "undue hardship" component. Id. (citing Vande Zande v. Wis. Dept. Admin., 44 F.3d 538 (7th Cir. 1995)). The court then determined that, at its essence, Endres asserted "a claim of entitlement in the future to choose which crimes would be investigated and which potential victims protected." Endres, 2003 WL 21480361 (analogizing to the "same claim of entitlement" asserted by the plaintiff in Ryan v. Department of Justice, 950 F.2d 458 (7th Cir. 1991)). The court engaged in an extensive analysis of various strongly-held religious beliefs that, if exercised by law enforcement officers during the course of their duties, would thwart the most basic tenets of public protection: the neutral enforcement of laws and protection of potential victims. Endres, 2003 WL 21480361. The Endres court held that an accommodation that would allow a law enforcement officer to choose which laws to enforce and whom to protect would be "unreasonable [for] any police or fire department to tolerate." Id. at *4. The court determined that Endres' complaint failed to state a claim upon which relief could be granted. Id.

Turning to the present case, it is apparent that Endres presents the same Title VII claim in this case. He bases his state action Title VII claim upon the same concepts discussed and resolved by the Seventh Circuit in Endres. Although the State could not have urged res judicata prior to briefing this case, inasmuch as the federal court's decision had not been announced, the State's presentment of additional authority herein allows us to address such.

"The doctrine of res judicata consists of two concepts, claim preclusion and issue preclusion." Wedel v. American Elec. Power Serv. Corp., 681 N.E.2d 1122, 1131

(Ind. Ct. App. 1997), trans. denied. The concept of claim preclusion will apply when a final judgment on the merits has been rendered which then acts as a complete bar to a subsequent action on the same issue or claim between those parties and their privies. Id. Under the concept of claim preclusion, "all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action." Id.

Issue preclusion, also referred to as collateral estoppel, acts to bar a subsequent attempt to relitigate the same fact or issue where that fact or issue was necessarily adjudicated in a former suit and is presented in a subsequent action. Mendenhall v. City of Indianapolis, 717 N.E.2d 1218, 1225 (Ind. Ct. App. 1999), trans. denied. "In that situation, the former adjudication will be conclusive in the subsequent action even if the two actions are on different claims." Id. However, issue preclusion does not extend to matters which were not expressly adjudicated. Id.

Issue preclusion is the branch of res judicata applicable here. In City of Anderson v. Davis, 743 N.E.2d 359, 365-66 (Ind. Ct. App. 2001), trans. denied, and Mendenhall, 717 N.E.2d at 1225-26, this court determined that the parties were collaterally estopped from raising issues in state court that had been finally determined in previous federal actions. Such is the case here. The complaint in federal court features the same parties, the same action, and the specific Title VII issue asserted by Endres in this case. Thus, the Seventh Circuit's decision on the Title VII issue bars Endres from relitigating that specific issue.

2. Federal and State Constitutional Claims

First, the State urges that Endres failed to raise federal and state constitutional religion claims until the filing

of his motion to correct errors, thereby waiving those issues. Although Endres' motion to correct error appears to contain the first clear attempt at consideration of the federal and state constitutions, given our precepts of notice pleading, the issues are properly before us.[2]

We turn first to the Indiana Constitution. In City Chapel Evangelical Free, Inc. v. City of South Bend, 744 N.E.2d 443, 445-46 (Ind. 2001), a case regarding the State's power of condemnation of church property, our supreme court outlined the tenets of the Indiana Constitution's pronouncements on religion and distinguished the federal provisions. The court noted three sections of "Article 1, the Bill of Rights, of the Indiana Constitution, which provide as follows:"

> Section 2. All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences.
> Section 3. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.
> Section 4. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent.

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[2] In his petition for judicial review of the Board's decision, Endres stated: "the decision of the Indiana State Police . . . was contrary to Title VII of the Civil Rights Act of 1964 and its progeny together with a violation of the United States Constitution and Indiana Constitution each guaranteeing religious freedom and the free exercise thereof in that the State Police discharged Petitioner, Ben P. Endres, for the lawful exercise of his religious beliefs without making reasonable accommodations . . . ." (Appellant's App. 46).

Id. Endres cites the same three sections in his Brief.

The court in City Chapel observed:

> When Indiana's present constitution was adopted in 1851, the framers who drafted it and the voters who ratified it did not copy or paraphrase the 1791 language of the federal First Amendment. Instead they adopted seven separate and specific provisions, Sections 2 through 8 of Article 1, relating to religion. Clearly, the religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment. We reject the contention that the Indiana Constitution's guarantees of religious protection should be equated with those of its federal counterpart and that federal jurisprudence therefore governs the interpretation of our state guarantees.

Id. (footnotes omitted). As to the protections afforded by Indiana's Bill of Rights and the State's ability to burden those rights, the court stated:

> [I]n Indiana the police power is limited by the existence of certain preserves of human endeavor, typically denominated as interests not 'within the realm of the police power,' upon which the State must tread lightly, if at all. Put another way, there is within each provision of our Bill of Rights a cluster of essential values which the legislature may qualify but not alienate. A right is impermissibly alienated when the State materially burdens one of the core values which it embodies.

Id. at 446 (quoting Price v. State, 622 N.E.2d 954, 960 (Ind. 1993) (citations omitted)).

While Endres does not specifically so state, his argument must be that the Department's rule requiring him to report for duty as a gaming agent, once he failed to request a transfer or a promotion, or to solicit a volunteer in his stead, materially burdened his right of religious freedom guaranteed by the Indiana Bill of Rights. We reject that notion.

Churches, and by implication the religious freedoms enjoyed by worshippers, are subject to reasonable regulations, not tantamount to alienation, by the State to the extent as might be required to promote the public health, safety, or general welfare. See City Chapel, 744 N.E.2d at 446; Church of Christ v. Metro. Bd. Of Zoning App., 175 Ind. App. 346, 351, 371 N.E.2d 1331, 1334 (1978). A core right would be materially burdened "[i]f the right, as impaired, would no longer serve the purpose for which it was designed." City Chapel, 744 N.E.2d at 447 (quoting Price, 622 N.E.2d at 960 n.7). "The 'material burden' analysis looks only to the magnitude of the impairment and does not take into account the social utility of the state action at issue." Id.[3]

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[3] The State contends that Title VII "requires more than either the federal or state Constitution, and therefore, a ruling in favor of the Department on the Title VII issue precludes a finding that . . .Endres' constitutional rights were violated." Appellee's Br. at 23. The Title VII analysis requiring reasonable accommodations that do not present undue hardships to the employer differs from the "materially burdens" analysis under the Indiana Constitution in that the social utility of the burden is not considered. Put differently, the undue hardship to the employer considered of paramount importance under Title VII, is not a factor of the same significance under the Indiana Constitution analysis.

Here, the Department's interagency agreement with the Indiana Gaming Commission requiring Troopers to serve as gaming agents at riverboat casinos promotes the health, safety, and general welfare of the public. The use of Troopers to protect the public and enforce laws relating to gaming was a natural outgrowth of their duties as law enforcement officials. In explaining the neutral and unbiased approach required of law enforcement officials, the federal court in Endres stated:

> Law-enforcement agencies need the cooperation of all members. Even if it proves possible to swap assignments on one occasion, another may arise when personnel are not available to cover selective objectors, or when . . . seniority systems or limits on overtime curtail the options for shuffling personnel. Beyond all of this is the need to hold police officers to their promise to enforce the law without favoritism—as judges take an oath to enforce all laws, without regard to their (or the litigants') social, political, or religious beliefs. Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police.

Having said that, to the extent that our analysis under the Indiana Constitution parallels the Title VII discussion within Endres regarding the burdens to the parties, we believe our analysis to be appropriate under the standard outlined in City Chapel. Interestingly, within his Brief and without any analysis, Endres admits the nexus between Title VII and constitutional provisions by stating: "Clearly, for the most part, the constitutional jurisdiction has been defined, expanded, and supplanted by Title VII case law development. Title VII, however, is itself rooted in the original constitutional guarantees." Appellant's Br. at 17 n.1. The foregoing was apparently offered to explain Endres' brief analysis of the constitutional provisions.

> 'The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty—that Jewish policemen protect neo-Nazi demonstrators, [and] that Roman Catholic policemen protect abortion clinics . . . . We judges certainly want to think that U.S. Marshals protect us from assaults and threats without regard to whether, for example, we vote for or against the pro-life position in abortion cases.'

Endres, (quoting Rodriguez v. Chicago, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, C.J. concurring)). Thus, the Department's actions served goals that would allow some limitations on the religious freedoms of those Troopers who find gaming inconsistent with their religious beliefs.

The impairment to Endres' constitutional religious freedoms was not so material or absolute inasmuch as he had alternatives until the final assignment was made on March 2, 2000. Endres acknowledged that he ignored opportunities to apply for promotions or seek transfers that would have resolved his dilemma. The Department's interagency agreement requiring Troopers to serve as gaming agents was well known in advance to Endres. Also, Endres knew that the Bremen Post, where he was stationed, was included in the gaming agent lottery as of September 1999. It is apparent that the mere existence of the interagency agreement did not burden Endres' religious freedoms, inasmuch as he did not formally express his concerns until his name was chosen first in the October 12, 1999 lottery for assignment of gaming agents. Notwithstanding his supervisor's assurance that, in the past, sufficient volunteers

had filled the gaming positions at the Blue Chip Casino, Endres knew that he would definitely be assigned first if the gaming positions were not filled by volunteers. Endres specifically chose not to request a transfer or a promotion to corporal, two of the available alternatives, until after his assignment to the Blue Chip Casino occurred on March 2, 2000. Accordingly, no burden to his religious freedoms would have occurred had he pursued an available alternative at the time his name was chosen as the first Trooper in line for assignment to the Blue Chip Casino. Because alternatives that did not burden his religious freedoms had been available to Endres until his official assignment, the assignment of Troopers as gaming agents did not materially burden Endres' religious freedoms under the Indiana Constitution, and his claim under the Indiana Constitution fails.

We turn to Endres' federal constitution claim. Endres does not state the portions of the federal constitution upon which he relies; instead, he offers two federal cases as analogous to his own: Indiana State Employees Assoc., Inc. v. Negley, 365 F.Supp. 225 (1973) (employees may not be discharged solely for political affiliation, or reasons motivated by racial or religious factors), and Thomas v. Review Bd. Of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (public welfare benefits cannot be denied on the basis of faith). Without significant analysis, Endres suggests that the cases are relevant because his termination was based upon his religious beliefs. The record discloses otherwise. The evidence demonstrates that Endres was terminated for insubordination for failing to report to his assignment once it was officially made on March 2, 2000.

Therefore, the trial court did not err in determining that the Board's decision was supported by substantial evidence, and the trial court's judgment is affirmed.

BAKER, J., concurs.

SULLIVAN, J., concurs with separate opinion.

FILED – August 27, 2003
Brian Bishop
Clerk of the Indiana Supreme Court
Court of Appeals and Tax Court

IN THE
COURT OF APPEALS OF INDIANA

BEN ENDRES,	)	
Appellant-Defendant,	)	
vs.	)	No. 50A05-0210-CV-477
	)	
INDIANA STATE POLICE,	)	
Appellee.	)	

SULLIVAN, Judge, concurring

I concur but write separately to make an observation concerning the res judicata effect of the decision of the Seventh Circuit Court of Appeals rather than any res judicata effect of the litigation at the Federal District Court level.

The chronology of events as between the Marshall Superior Court and the Federal District Court is germane to our consideration of the issue. Endres filed his Petition for Judicial Review on May 8, 2001. On December 28, 2001, the Federal District Court for the Northern District of Indiana decided that Endres' Civil Rights claim could proceed in federal court. Thus, Endres was victorious, at least temporarily, at the federal court level. Accordingly, the federal trial court decision could not have a res judicata

effect adverse to the interest of Endres.[4] On June 27, 2002, the Marshall Superior Court entered its judgment denying relief to Endres under the Civil Rights Act. It was not until one year later, June 27, 2003, that the Seventh Circuit held that Endres, as a law enforcement officer, had no viable claim under the Civil Rights Act for the termination of his employment.

Be that as it may, the Seventh Circuit decision became final while the present appeal was pending before us. That decision, therefore, has res judicata implications to the decision we must make upon this issue before us. See 50 C.J.S., Judgments § 711 (1977) ("a decision of an appellate court will preclude any further action on the same matter between the parties . . . .")[5]

For the reasons stated I concur.

---

[4] The decision of the Federal District Court was not a decision upon the merits of whether Endres was entitled to recover under his civil rights action but could be argued to be a decision upon the merits of the issue finally decided by the Seventh Circuit, i.e., whether Endres had a viable civil rights claim at all. It was upon this issue that the Seventh Circuit reversed the Federal District Court.

[5] The termination litigation in the Marshall Superior Court was not further action because it occurred prior to the Seventh Circuit decision. However, it may be reasoned that the appeal before us is such further action and is subject to the application of the res judicata doctrine.

APPENDIX B

FILED – IN OPEN COURT
June 27, 2002
Janice S. Fisher
Clerk of Superior Court No. 1
Marshall County, State of Indiana

STATE OF INDIANA
COUNTY OF MARSHALL
MARSHALL SUPERIOR COURT NO. 1
2002 CALENDAR TERM

BEN R.[sic] ENDRES, Plaintiff,	)	
v.	)	CAUSE NUMBER
	)	5001-0105-MI-09
INDIANA STATE POLICE, Defendant.	)	

ORDER
ON PETITION FOR JUDICIAL REVIEW

THIS MATTER came before the Court on February 11, 2002, for hearing on the Petitioner's Petition for Judicial Review which was filed on May 8, 2001. The Plaintiff, **BEN R.[sic] ENDRES**, appeared in open Court in person and by counsel, David C. Kolbe. The Defendant, **INDIANA STATE POLICE**, appeared in open Court by Deputy Attorney General for the State of Indiana, Wayne E. Uhl.

Arguments were heard.

After arguments, the Court took this matter under advisement. After a review of the Petition, the Answer, the record of the proceedings, the arguments of counsel, and the law, the Court now FINDS that:

1. On April 19, 2001, the State Police Board issued a detailed written decision affirming the decision of the Superintendent of the State Police to terminate the employment of the Plaintiff.

2. The Plaintiff argues that the Board's decision was "arbitrary, capricious, abusive of discretion, unconstitutional, and otherwise not in accordance with law" and seeks reinstatement of his employment.

3. When reviewing the State Police Board's decision, this Court cannot reweigh the evidence nor substitute its judgment for that of the Board. Furthermore, this Court is bound by the agency's findings of fact if those facts are supported by substantial evidence. Finally, the Plaintiff bears the burden of demonstrating that the Board's decision was invalid.

4. The Plaintiff first contents that the Board's failure to issue an order within ninety (90) days as required by I.C. 4-21.5-3-27(g) divests the Board of jurisdiction over this matter. However, a failure to comply with that provision does not render a decision invalid.

5. Substantial evidence of probative value supporting the Board's decision to uphold the Plaintiff's termination of employment exists in the record of the proceedings. Specifically, from the record, one can conclude that:

A. In September of 1999, the Plaintiff was made aware that he would be part of a lottery for selecting a trooper for assignment on a casino boat.

B. The lottery was conducted on October 12, 1999, and the Plaintiff was selected for that assignment. The Plaintiff informed his district commander that he

had a conflict between that job and his religious beliefs. Although it was hoped that other officers might volunteer for that assignment and the district commander informed her troopers that it was "unlikely that anyone would be sent", it is clear from the Plaintiff's testimony that he understood that he could get orders to report to the casino boat for duty.

C. On October 13, 1999, transfer requests by troopers for different assignments within the department were opened and remained open for approximately two weeks. There were five openings available within the department which did not require an assignment on a casino boat. The plaintiff did not seek any transfer.

D. On October 18, 1999, promotional opportunities for two positions at the Plaintiff's district post were announced. Those opportunities did not require an assignment on a casino boat. Although the Plaintiff was eligible for those promotions, he did not apply.

E. On March 2, 2000, the Plaintiff was formally assigned for duty at the casino boat. Prior to that date, he had not discussed his conflicts with the Superintendent of the Indiana State Police nor any members of the executive staff of the State Police.

F. At a meeting with the Superintendent on March 13, 2000, the Plaintiff was informed that he was expected to report for the assigned duty on April 2, 2000. It was understood by the Plaintiff that he could be terminated for refusing the assignment. Only then did the Plaintiff ask for a promotion or a transfer. His requests were denied.

G. The Superintendent by a letter dated March 23, 2000, informed the Plaintiff that he had orders to report to the casino boat.

H. The Plaintiff did not report to his assignment as ordered.

6. The Board's decision to uphold the Plaintiff's termination was supported by the law. Specifically, from the record, one can conclude that:

A. The Plaintiff was not singled out for this assignment. The use of a lottery system by the State Police provided a neutral selection process.

B. The Plaintiff's religious objections to the assignment could have been avoided if he would have sought transfer to the different assignments then available or sought a promotion which was then available and for which he was eligible. Each of those alternatives are reasonable accommodations which were available and could have been made. However, the Plaintiff did not take advantage of those opportunities even though he had approximately five months to do so prior to receiving the official order concerning the assignment.

C. By failing to report for duty as ordered, he violated department rules concerning insubordination.

D. The department as a whole would be harmed if the Superintendent did not take action against insubordination.

7. Since the Board's decision is supported by substantial evidence and also supported by the law, I cannot reweigh the evidence nor impose my judgment for that of the Board. The Plaintiff has failed to meet its burden of demonstrating that the Board's decision was invalid.

IT IS THEREFORE ORDERED that the relief sought by the Plaintiff's Petition for Judicial Review is denied. Judgment is entered for the Defendant.

SO ORDERED this 27th day of June, 2002.

s/_____
Robert O. Bowen,
Judge, Marshall Superior Court No. 1

Distribution: David C. Kolbe, Counsel for Plaintiff
Wayne E. Uhl, Deputy Attorney General

APPENDIX C

INDIANA STATE POLICE BOARD

IN THE MATTER OF THE APPEAL OF
TROOPER BEN P. ENDRES OF
THE DISCIPLINARY ACTION TAKEN BY
SUPERINTENDENT MELVIN J. CARRAWAY

Internal Investigation No. 00-024
Decision Date: April 9, 2001

APPEARANCES:

For the Petitioner, Ben P. Endres:
David C. Kolbe, Esq.
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302 West Center Street
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For the State:
Karen Freeman Wilson, Attorney General
By: David L. Steiner, Deputy Attorney General
219 State House
Indianapolis, Indiana 46204

By the Indiana State Police Board:
George D. Gardner, President (Presiding)

I. Brief Statement of the Case

Under an agreement between the Indiana Gaming Commission and the Indiana State Police Department, personnel of the Indiana State Police Department assist the Gaming Commission comply with its responsibilities under IC 4-33-4-3(7) by acting as, and being cross designated as, Commission Agents. In August of 1997 Melvin Carraway, Superintendent of the State Police Department, implemented

a new policy to fill vacancies in the ranks of personnel assigned to assist the Gaming Commission. Vacancies had been filled by probationary officers; however, following implementation of the new policy, the vacancies were filled by drawing from all troopers assigned to designated districts where riverboats were moored. Such assignments would be for a one (1) year tour of duty. In September of 1999 Superintendent Carraway extended this policy to include troopers assigned to certain counties in districts that were adjacent to districts where riverboats were moored, including Marshall and St. Joseph Counties in the Bremen District. The addition of these counties added Trooper Ben P. Endres of the Bremen District, among others, to a lottery system used to fill vacancies in the ranks of personnel assigned to the Blue Chip Casino not filled by volunteers. In October of 1999 the Bremen District conducted its lottery and Trooper Endres was selected first.

On March 2, 2000, due to a vacancy that had not been filled by volunteers, Trooper Endres received notification of his assignment to the Blue Chip Casino. Trooper Endres made an appointment with Superintendent Carraway for March 13, 2000, when he met with the Superintendent and reported that he could not report for the assignment because of his religious beliefs. Superintendent Carraway responded that he would have to report. On March 23, 2000, Superintendent Carraway sent Trooper Endres a memorandum informing him that no exception could be granted and that Trooper Endres' failure to report would meet with disciplinary action. Trooper Endres did not report to the Blue Chip Casino on April 3, 2000; instead, he reported to the Bremen District for duty. Superintendent Carraway made contact with the acting commander at the Bremen District, Lieutenant Scott Schuh, and had him relay a directive to Trooper Endres to report to the Blue Chip Casino. Trooper Endres refused, citing religious objections.

II. Procedural History and Issues

This Board is responsible for the review of disciplinary action taken by the Superintendent of the State Police Department pursuant to IC 10-1-1-6. On April 19, 2000, State Police Superintendent Melvin J. Carraway preferred written charges against Trooper Ben P. Endres. The charges were as follows:

Charge I – Refusal to Comply with a Written Order

> On or about April 3, 2000, Trooper Ben P. Endres refused to comply with the written order of Superintendent Melvin Carraway dated March 23, 2000, to report for a gaming boat assignment, when he reported to the Bremen District for duty instead, in violation of Police Rule 17, Section 17-3(A)15.

Charge II – Insubordination

> On or about April 3, 2000, Trooper Ben P. Endres refused to comply with the verbal order of Superintendent Melvin J. Carraway as relayed to him by Lieutenant Scott D. Schuh, the acting commander of the Bremen District, to report for his assignment at the casino, in violation of Police Rule 17, Section 17-3(A)3.

Trooper Endres appeared before Superintendent Carraway on April 26, 2000. Trooper Endres denied the charges. On April 27, 2000, Superintendent Carraway entered his Finding and Order that the evidence did support the charges against Trooper Endres and Superintendent Carraway entered the following order:

A. That Trooper Ben P. Endres is terminated from the Department effective April 27, 2000.

B. That Lieutenant Schuh pick up and inventory all Departmental property in the possession of Trooper Endres.

C. That proper entries be made in payroll, personnel and other records of the Department to carry out this Order.

Trooper Endres timely filed notice of his intent to appeal the disciplinary action which was assessed and imposed pursuant to the order of the Superintendent. The matter was properly before the Board pursuant to Indiana Code 10-1-1-6.

This matter was heard by David J. Allen, Pat J. Bennett, George D. Gardner, James W. Heyde, Robert B. McConnell, and Gwendolyn J. Morgan, the six (6) members of the Board of the State Police Department, on August 21, 2000. The Petitioner, Ben P. Endres, appeared in person and by counsel. The State Police Department appeared by counsel. Witnesses were sworn. The State's witnesses were Colonel Donald J. Brackman, Lieutenant Colonel L. Dean Petree, Trooper Donna M. Elam, Lieutenant Scott D. Schuh, Sergeant Glen H. Rabanus, and Superintendent Melvin Carraway. The Petitioner's witnesses were Lieutenant Joan E. Malayter-Brubaker (retired), Master Trooper Gregory A. Good, Nathan L. Stedman, and the Petitioner. Exhibits were received into evidence. The State introduced Exhibits 1 through 13 inclusive without objection. The Petitioner introduced Exhibit A. The Exhibits are described in the Addendum attached hereto and incorporated by reference. The Petitioner and the State submitted post hearing Briefs

and Reply Briefs at the Board's invitation. These Briefs are attached hereto.

The Board requested a Transcript of the testimony presented on August 21, 2000, be prepared. Where appropriate the Board has cited to the testimony of particular witnesses. Such citation, including page number, refers to that Transcript.

The facts material to the Superintendent's written charges being largely undisputed, the issue placed before the Board was whether or not Ben Endres' refusal to report for duty on a riverboat must be excused. Petitioner initially stated the issue for review as "[w]hether Trooper Benjamin P. Endres was wrongfully discharged and should be reinstated when the State Police failed to provide any reasonable accommodation for his religious belief." Officer's Brief, pg. 1. He later restated the issue as, "...whether the State Police was obligated to provide reasonable accommodations to Ben Endres after the issuance of the order to Ben to report to the gambling boat." Response Brief of Ben Endres, pg. 1.

III. Findings of Fact

The record of the proceedings consisting of the testimony of the witnesses, all exhibits received at the hearing and all other papers filed by the parties, and the whole having been duly considered, the following findings are made from the entire record:

1. The pertinent Police Personnel Rules of the State Police Department provide as follows:

> Police Rule 17, Section 17-3(A) . . . "Offenses by Employees against the authority of the Department shall include, but shall not be limited to:

3. Insubordination.

. . .

15. A violation of these rules, a department regulation, a standard operating procedure, or a written or verbal order of a commanding officer when such order is within the scope of the authority of the commanding officer."

2. The Indiana State Police Department has law enforcement responsibilities on riverboats in the State of Indiana; Superintendent Carraway implemented a lottery selection process in Districts where riverboats were moored in 1997 to fill vacancies on riverboats not filled by volunteers to avoid assigning inexperienced probationary officers Testimony of Col. Brackman, pp. 24ff; Testimony of Supt. Carraway, pp. 137ff.

3. Superintendent Carraway extended the lottery selection process to certain counties adjacent to districts in which riverboats were moored because of travel time and to ease concerns about availability of personnel. Testimony of Lt. Col. Petree, pp. 80ff; Testimony of Supt. Carraway, pp. 140-141.

4. Trooper Endres, who was assigned to the Bremen District, and worked in one of the added counties, knew of the policy change in September of 1999. Testimony of Ben Endres, pg. 202.

5. On the day that the Bremen District conducted its draw, October 12, 1999, Trooper Endres was told by fellow employees, and confirmed by his commanding officer, that he had been selected first. Exhibit 8; Exhibit 10, pp. 2 and 3;

Testimony of Lt. Malayter-Brubaker (ret'd), pg. 168; Testimony of Ben Endres, pp. 202-203.

6. On October 12, 1999, Trooper Endres expressed to Lieutenant Malayter-Brubaker his reservations about serving on a riverboat because of his religious beliefs about gambling. Testimony of Lt. Malayter-Brubaker (ret'd), pg. 168; Testimony of Ben Endres, pg. 203.

7. Trooper Endres was a trustee and youth sponsor at the Community Baptist Church of South Bend. One of his church's articles of faith, one that he personally subscribes to, is, "..that each member must remain separate from such ungodly practices as sodomy, pornography, fornication, adultery, gambling, the illegal use of drugs, and other such vices prominent in the world, system in which we live." Exhibit A, Testimony of Pastor Nathan "Bud" Stedman, pp. 189ff; Testimony of Ben Endres, pp. 200-201, and 208.

8. On October 13, 1999, voluntary inter-district transfers were opened, and on October 18, 1999, two vacancies for corporal at the Bremen District were opened. Exhibit 9, Testimony of Sgt. Rabanus, pp. 119ff.

9. Trooper Endres was eligible for transfer and he was eligible to compete for promotion to corporal, either of which would have removed his name from the lottery list, but he chose not to do either one. Testimony of Col. Brackman, pp. 71ff; Testimony of Lt. Col. Petree, pp. 78ff; Testimony of Sgt. Rabanus, pp. 118ff; and Testimony of Ben Endres, pp. 218ff.

10. Trooper Endres was notified of his assignment to the Blue Chip Casino effective April 2, 2000 by internal memoranda dated March 2, 2000. Exhibits 11 and 12; Exhibit 10, pg. 3; Testimony of Sgt. Rabanus, pp. 122ff.

11. Trooper Endres met with Superintendent Carraway on March 13, 2000, and expressed his reservations about his assignment to the Blue Chip Casino. Testimony of Supt. Carraway, pg. 142; Testimony of Ben Endres, pp. 206ff and 222-223.

12. Superintendent Carraway did ask Trooper Endres if he could work dockside rather than on the riverboat and Trooper Endres said that he could not. Testimony of Supt. Carraway, pp. 142 and 143.

13. At the conclusion of this meeting Superintendent Carraway told Trooper Endres that he would have to serve a year on the riverboat in compliance with existing policy, and he sent Trooper Endres a memorandum dated March 23, 2000, stating that a failure to follow his orders to report would meet with disciplinary action. Testimony of Supt. Carraway, pg. 146; Testimony of Ben Endres, pp. 210, 214-215, and 222-223.

III. Conclusions of Law

1. The State and the Petitioner emphasized the issue of reasonable accommodation of religious beliefs under Title VII of the Civil Rights Act of 1964, as amended, in their arguments and briefs. The Board reaches this issue in the context of the Indiana State Police Department's personnel rules followed in this matter. The charges that the State brings against the employee, insubordination and failure to follow a written or verbal order under Police Rule 17, which, require that the order must be issued "within the scope of authority of the commanding officer." The Board cannot find verbal or written orders that are contrary to the Department's legal responsibilities as a public employer

under the Civil Rights Act to be orders "within the scope of authority of the commanding officer."

2. Title VII requires an employer to reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business. Rodriguez v. City of Chicago, 156 F.3d 771, 775 (7th Cir. 1998).

3. A reasonable accommodation is a process or procedure that "eliminates the conflict between employment requirements and religious practices." Ansonia Board of Education v. Philbrook, 479 U.S. 60, 70, 93 L. Ed 2d 305, 107 S.Ct. 367 (1986).

4. Department procedures for transfer and promotion, Trooper Endres could have transferred to the Toll Road District, or been promoted to corporal, did afford him with the opportunity to eliminate the conflict between employment requirements and his religious practices, yet he chose not to take advantage of them when they were available.

5. By refusing to exercise these options, the resulting conflict was Trooper Endres' responsibility. As held in cases cited by the Petitioner and the State, Title VII only requires reasonable accommodation, not satisfaction of an employee's every desire. Rodriguez, 156 F.3d at 776 citing Wright v. Runyon, 2 F.3d 214 at 217 (7th Cir. 1993), cert. denied, 510 U.S. 1121, 127 L. Ed. 2d 394, 114 S.Ct. 1077 (1994).

6. Should the Indiana State Police Department be responsible for withdrawing assignments that conflict with officers' personal beliefs, after the assignment has been

given, the hardship on the Department is potentially much broader than just assignment of personnel on riverboats. Many assignments that police personnel are required to undertake by their employment requirements have the potential for being repugnant to the officers' personally. Borrowing from Judge Easterbrook's opinion in Ryan v. United States Department of Justice, a case cited by the State, the Indiana State Police, like the FBI in that case, may "choose to be stingy with exceptions lest the demand for them overwhelm it." 950 F.2d 458, at 462 (7th Cir. 1991).

7. Therefore, the Superintendent's written and verbal orders to Trooper Endres were lawful orders issued within the scope of authority of the commanding officer, Superintendent of the State Police Department, Melvin J. Carraway.

III. Determination Based upon Findings of Fact and Conclusions of Law

1. By reason of the findings above, the Board determines that the State has sustained the burden of proof for the charges preferred against Trooper Ben P. Endres and now finds that there is substantial evidence that:

a. On or about April 3, 2000, Trooper Ben P. Endres refused to comply with the written order of Superintendent Melvin Carraway dated March 23, 2000, to report for a gaming boat assignment, when he reported to the Bremen District for duty instead, in violation of Police Rule 17, Section 17-3(A)15, and that

b. On or about April 3, 2000, Trooper Ben P. Endres refused to comply with the verbal order of Superintendent Melvin J. Carraway as relayed to him

by Lieutenant Scott D. Schuh, the acting commander of the Bremen District, to report for his assignment at the casino, in violation of Police Rule 17, Section 17-3(A)3

and the State Police Board finds that Trooper Endres violated the rules of the Department as recited in the charges.

2. And further, by reason of the findings above, the Board finds that Trooper Endres' discipline by Superintendent Carraway, termination, was rationally related to the misconduct, and was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to the law. Therefore, the Board affirms the discipline imposed by Superintendent Carraway.

IT IS THEREFORE ORDERED AND DIRECTED by the State Police Board that the sanction imposed by Superintendent Carraway against Trooper Ben P. Endres should be, and hereby is, upheld.

s/__ s/__ s/__
Gardner, Heyde, and McConnell concurring.

s/__ s/__
Allen and Bennett dissenting.

Ms. Morgan did not participate in the decision on this matter.

APPROVED:

I hereby certify that the above is a true and correct copy of the decision of the Board as approved in this matter this 9th day of April, 2001.

s/_____
James W. Heyde, Secretary

Copies to:

Ben Endres
Certified Mail No. 7099 3400 0004 0682 8994
David C. Kolbe, Esq.
David Steiner, Deputy Attorney General

ADDENDUM

State's Exhibits

Exhibit No. 1	Statement of Written Charges against Trooper Ben P. Endres
Exhibit No. 2	Memo from Melvin J. Carraway to Trooper Ben P. Endres dated Aprl 27, 2000, on the Subject of Disciplinary Action – Finding and Order
Exhibit No. 3	Interagency Agreement
Exhibit No. 4	Job Description for Trooper-Gaming Enforcement Division
Exhibit No. 5	Memo from Melvin J. Carraway to All Enforcement Personnel dated August 12, 1997, on the subject of Riverboat Assignments
Exhibit No. 6	Memo from Melvin J. Carraway to All Personnel dated September 14, 1999, on the subject of Policy-Gaming Lottery Residency Requirements
Exhibit No. 7	Memo from Donald J. Brackman to Melvin J. Carraway dated April 26, 2000, on the subject of Disciplinary Hearing – Trooper Ben P. Endres
Exhibit No. 8	Memo from Joan E. Malayter-Brubaker to L. Dean Petree dated October 12, 1999, on the subject of Lottery Drawing for Blue Chip Gaming Boat
Exhibit No. 9	Memo from L. Dean Petree to All Enforcement Personnel dated October 13, 1999, on the subject of Transfer Requests
Exhibit No. 10	Transcript of Trooper Ben P. Endres' Interview conducted by Sergeant Glen Rabanus on April 10, 2000

Exhibit No. 11	Memo from Mark Mason to Joan Malayter-Brubaker dated March 2, 2000, on the subject of Lottery Activation – Blue Chip Casino
Exhibit No. 12	Memo from Joan E. Malayter-Brubaker to Mark Mason dated March 2, 2000, on the subject of Lottery Activation – Blue Chip Casino
Exhibit No. 13	Memo from Melvin J. Carraway to Ben Endres dated March 23, 2000, on the subject of Reassignment to Gaming Boats

Petitioner's Exhibit

Exhibit No. A	Memo from Dr. Bud Stedman to Glenn Rabanus dated April 11, 2000, on the subject of Constitution and Articles of Faith

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

BENJAMIN P. ENDRES, JR., and UNITED STATES OF AMERICA, Plaintiffs,	)	Cause No. 3:01-CV-0518 RM
vs.	)	
INDIANA STATE POLICE, Defendant.	)	

ORDER

In accordance with the Court of Appeals' mandate [Docket No. 40], the court dismisses Benjamin Endres' complaint for failure to state a claim upon which relief may be granted.

SO ORDERED.

ENTERED: January 5, 2004

s/_____
Robert L. Miller, Jr., Chief Judge
United States District Court

cc: All Counsel of Record

Supreme Court, U.S.
FILED
MAR 26 2004
OFFICE OF THE CLERK

(3)

NO. 03-1183

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN ENDRES,
Petitioner,

v.

INDIANA STATE POLICE,
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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March 29, 2004

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United States Constitution, Eleventh Amendment. . . . 1, 2, 3

REPLY TO BRIEF IN OPPOSITION

On February 17, 2004, Petitioner Benjamin Endres filed a Petition for Writ of Certiorari seeking review of the Seventh Circuit's ruling that Title VII did not require a law enforcement agency or other "paramilitary" employer, under any circumstances, to reasonably accommodate an employee's task-specific request for religious accommodation. On March 19, 2004, Respondent filed its Opposition. In general, the Petition and the Opposition properly frame for this Court the important issues raised by this case. For example, by conceding that every other Court of Appeals that has addressed a similar Title VII claim has determined — regardless of the ultimate outcome of the individual case — that a case-by-case inquiry into the reasonableness of the accommodation sought *is* necessary, while the Seventh Circuit reached the opposite conclusion, Respondent effectively highlights why this Court's intervention to resolve the circuit split is necessary. Thus, while Endres disagrees with many of the legal and factual assertions in Respondent's Opposition, only two issues raised in the Opposition merit further discussion.

First, Respondent argues that this Court, to ensure its jurisdiction, must determine whether the Eleventh Amendment is jurisdictional and if so, whether Congress validly abrogated sovereign immunity through Title VII's religious accommodation requirement. (Resp. Br. at 15.) Respondent goes on to imply that Endres did not adequately present the jurisdictional issue to this Court. (*Id.*) Respondent's argument fails because the Eleventh Amendment is not jurisdictional and therefore this Court need not reach the Eleventh Amendment issue,[1] and even if the Eleventh Amendment issue were jurisdictional it would

[1] Endres discussed the Eleventh Amendment issues in his Petition. (Pet. at 20-23.)

come within a well-established exception to Rule 14.1(a)'s requirements.

Second, Respondent appears to make a preclusion argument, referring to state tribunal factual findings and asserting that "[t]hese state tribunal factual findings may estop any contrary federal court findings." (*Id.* at 16-17.) This argument fails both as a matter of law — because Respondent never raised this argument below and it is therefore waived — and logic, because the natural result of Respondent's argument would be that no court, state or federal, would provide Endres a forum to raise his Title VII claims.

I. There Is No Rule 14.1 Bar To This Court's Consideration Of The Issues Raised In The Petition.

Endres filed a complaint in the Northern District of Indiana alleging that Respondent illegally failed to accommodate his religious beliefs under Title VII. (Pet. App. D1-D5.) Respondent filed a motion to dismiss for lack of subject matter jurisdiction arguing that Congress invalidly abrogated state Eleventh Amendment immunity. (*Id.* C2-C3.) The district court denied the motion (*id.* C1), and Respondent pursued an interlocutory appeal. (*Id.* A3.) The Seventh Circuit, stating that the Eleventh Amendment does not present a jurisdictional barrier because states may consent to federal court jurisdiction, addressed whether Endres's complaint stated a claim. (*Id.* A4.)

In the first instance, if it chooses not to do so, this Court need not address the Eleventh Amendment issue because the Eleventh Amendment does not limit federal court subject matter jurisdiction. *See, e.g.*, *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 388-89 (1998) (ruling that the Eleventh Amendment "does not automatically destroy

original jurisdiction," because the Eleventh Amendment grants states a "defense" which the state may waive and which a court need not raise); *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) ("While the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, . . . we have recognized that it is not coextensive with the limitations on judicial power in Article III."). Consequently, the Seventh Circuit acted permissibly in addressing the merits of Endres's Title VII claim without reaching the Eleventh Amendment, and this Court need not address the issue.

Alternatively, even if the Eleventh Amendment were jurisdictional and this Court were to decide to reach the issue, Respondent's argument that Endres violated Rule 14.1(a) by not including it as a question presented fails because the Court must always determine its jurisdiction. Rule 14.1(a) states that the Court will address only those questions "fairly included" in the questions presented. The Court has "made exceptions to Rule 14.1(a)" for cases with the "possible absence of jurisdiction." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 (1993); *see also Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 398 (1979) ("An exception to [Rule 14.1(a)] is the question of jurisdiction."). Even assuming the Eleventh Amendment presents a jurisdictional issue the Court must raise, and assuming that Endres's question presented does not fairly include the Eleventh Amendment issue, this Court may still reach the issue consistent with Rule 14.1(a). Therefore, Respondent's argument is without merit.

II. The State Tribunal Proceedings Do Not Preclude Consideration Of Endres's Title VII Claims In Federal Court.

Respondent's preclusion argument fails as well, and thus presents no impediment to the granting of certiorari. Preclusion is an affirmative defense that is generally waived if not raised in a pleading. Fed. R. Civ. P. 8(c); *Arizona v. California*, 530 U.S. 392, 410 (2000). Respondent never raised below the argument that state tribunal factual findings are preclusive in any manner in this federal action, despite the fact that those claimed findings existed at the time of the briefing and argument before, and ruling of, the Seventh Circuit. As a result, Respondent has waived the argument.

In essence, Respondent argues that no court may hear Endres's Title VII claims. Here, Respondent argues that state tribunal findings are preclusive (Resp. Br. at 16.), while in state court Respondent succeeded in arguing that Endres's federal court action was preclusive to the state court action. (Resp. App. 7a-9a.) Respondent cannot have it both ways, effectively denying Endres from having his day in *any* court.

CONCLUSION

Endres presents an issue of national import: whether police departments, as well as other "paramilitary" employers including fire departments, have a duty under Title VII to accommodate task-specific requests for religious accommodation. Respondent raises no argument in its Opposition that undermines the need for this Court to

address that issue for the first time, thus resolving a current split in the circuits. Accordingly, this Court should grant Endres's Petition.

Respectfully Submitted,

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March 29, 2004